(1) No. 95-2093 JUN 26 '96

In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1995

In Re:

DONALD EDWARD HAMER,

Debtor.

BERDJ MOVSESIAN; ADRIENNE MOVSESIAN; NOUBAR MAHDESSIAN; ANN MAHDESSIAN; A & N, INC.; BERDJ & NOUBAR CORP.,

Petitioners,

vs.

DONALD EDWARD HAMER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the decision below decide an important question of federal law that has not been, but should be, settled by the United States Supreme Court?

(2) Is the decision below in conflict with a relevant decision of the United States Supreme Court?

(3) Is the decision below in conflict with the decision of another United States Court of Appeal on the same important matter?

(4) Do Bankruptcy Rules 4007(c) and 9006(b)(3) prohibit the court from exercising its equitable powers under 11 U.S.C. § 105(a) and the common law to extend the time permitted for filing a Complaint to Determine Dischargeability in every imaginable circumstance other than the court itself having provided improper notice?

(5) In a case, as herein, where the Petitioners established sufficient equitable circumstances involving, and excusable neglect relating to, the filing of a Complaint to Determine Dischargeability on the day after the bar date, without giving consideration to the said established equitable circumstances, did the District Court and Court of Appeals err in reversing the Bankruptcy Court's Order permitting said Complaint to be filed?

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STATEMENT OF JURISDICTION

The Judgment Order sought to reviewed was entered by the United States Court of Appeals for the Third Circuit on March 28, 1996.

Jurisdiction to review on a writ of certiorari the Judgment Order in question is conferred on the Supreme Court by 28 U.S.C. § 1254(1) since it is based upon the petition of the parties to a civil case after rendition of a judgment entered by the United States Court of Appeals.

STATUTE AND RULES INVOLVED

11 U.S.C. § 105(a) provides in pertinent part:

§ 105. Power of court.

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Bankruptcy Rule 4007(c) provides:

> A complaint to determine dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of the creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Bankruptcy Rule 9006(b)(3) provides:

> The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those rules.

STATEMENT OF THE CASE

The Petitioners purchased a car wash business (and the real estate on which said business was located) from the Respondent for $1,170,000 and, subsequent thereto, discovered that they had been defrauded. On March 5, 1990, the Petitioners filed a lawsuit in the Superior Court of New Jersey against, *inter alia,* the Respondent and alleged, among other things, fraud, misrepresentation, and violation of the New Jersey Consumer Fraud Act. Numerous misrepresentations were made to the Petitioners by the Respondent in connection with the said purchase, including the Respondent's provision to the

Petitioners of fraudulent and manufactured income tax returns. The Petitioners sought to recover compensatory and punitive damages, a return of their $300,000 cash payment to the Respondent, and a rescission of a note and second mortgage.

The parties then exchanged voluminous items of written, pretrial discovery. Literally, thousands of pages of discovery and documents were served and produced. The parties retained expert witnesses, and the Petitioners alone served eleven (11) reports from five (5) different experts, whose areas of expertise included accounting, business evaluation, banking, and medicine. The parties conducted approximately thirty (30) depositions of fact witnesses comprising thousands of pages of deposition transcripts. After several years of such extensive pre-trial discovery, the Respondent admitted, through his counsel, that tax returns and other financial documentation which he had provided to the Petitioners (both prior to the purchase and during discovery of the case) were false and manufactured. The parties then submitted pretrial memoranda, including lists of witnesses, copies of experts reports, recitations of factual assertions and overviews of anticipated legal issues, lists of proposed physical exhibits, and stipulations. The Petitioners' submission alone included the identification of approximately 30 fact witnesses, five expert witnesses, more than 84 specifically identified, multi-page documents, 23 specified legal issues, and 32 separately designated, proposed stipulations.

Only one week prior to trial, the Respondent (and his two corporations) filed a bankruptcy petition, thereby staying the Petitioners' action. The state court action was then removed by the Respondent to the United States District Court for the District of New Jersey, Newark vicinage and, pursuant to local rules, was referred to the Bankruptcy Court. The Bankruptcy Court employed an improperly-completed matrix supplied to it by the Respondent (31a) and, as a result thereof, neither the

Petitioners nor their state court counsel received notice from the Clerk of the Bankruptcy Court setting forth a bar date for the filing of a Complaint to Determine Dischargeability (31a). As previously noted, prior to the bar date, the Respondent himself removed the said state court action to federal court and, pursuant to a standing order of the court, the removed action was then referred to the Bankruptcy Court (34a-35a, 38a).

The Petitioners' State Court counsel prepared a Complaint to Determine Dischargeability (the "Complaint") and, the day before the bar date, delivered same into the hands of a recognized overnight delivery service for filing with the Clerk of the Bankruptcy Court (32a). In addition, counsel for the Respondent was given telephonic notice that the Complaint had been sent to the Court for filing. Unfortunately, the Bankruptcy Court had moved its location and the mailing envelope was addressed to the Bankruptcy Court's prior location, which was the address listed in the previous year's New Jersey Lawyer's Diary (32a-33a) and was the address employed previously by both Petitioners' counsel and other counsel when papers were mailed to the Bankruptcy Court. On the bar date, the delivery service took the Complaint to the Bankruptcy Court's prior location but could not locate the Clerk's office. The Petitioners were not notified by the delivery service of any delay in delivery. The delivery service then ascertained the new location of the Bankruptcy Court and filed the Complaint at the start of the business day following the bar date (32a-33a).

On March 28, 1994, the Respondent filed a motion to dismiss the Complaint for untimely filing. After oral argument held on September 8, 1994, the Honorable William F. Tuohey, U.S.B.J., denied the motion (36a) and made findings of fact which supported its conclusion that the only permissible equitable result, given all of the attendant circumstances of this case, was to permit the Petitioners to file the Complaint one day

(actually 38 minutes) late (31a-36a). Thereafter, the Respondent filed a motion for reconsideration, which was denied (16a-17a).

The Respondent then filed an appeal to the United States District Court. In a written Opinion (3a-14a), the District Court did not disturb any of the factual determinations of the Bankruptcy Court since they were to be given conclusive effect unless they were found to be "clearly erroneous". The District Court stated that the issue on appeal was whether a Bankruptcy Court can allow a plaintiff to file a Complaint to Determine Dischargeability late if the late filing was the result of excusable neglect (7a) and held that the Bankruptcy Court may do so only if the plaintiff followed the precise procedures set out in Bankruptcy Rule 4007(c) which requires a motion to extend such time to be made before the bar date (14a). The District Court recognized that "although barring the plaintiffs from filing a Complaint in this case may seem inequitable, Congress has not provided for any other result" (13a). The District Court's decision never specifically addressed the Petitioners' contention that the Bankruptcy Court was empowered to consider all of the attendant circumstances and exercise its equitable powers under 11 U.S.C. § 105(a) and the common law, if appropriate, to extend the filing deadline. The District Court held that the Bankruptcy Court had erred in failing to dismiss the Complaint, reversed the Bankruptcy Court's Order, and remanded the case to the Bankruptcy Court for dismissal of the Complaint (14a).

The Petitioners filed an appeal from the District Court's Order (15a) and, on March 28, 1996, the United States Court of Appeals for the Third Circuit affirmed same, without opinion (1a-2a).

The United States Bankruptcy Court for the District of New Jersey had original subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157(a) and (b) and 28 U.S.C. § 1334(b).

REASONS FOR GRANTING THE WRIT

I.

A WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT.

The Court of Appeals, by affirming the Order of the District Court, without opinion, effectively established the following rule of federal law:

> BANKRUPTCY RULES 4007(c) AND 9006(b)(3) PROHIBIT A BANKRUPTCY COURT FROM EXERCISING ITS EQUITABLE POWERS TO EXTEND THE TIME PERMITTED FOR FILING A COMPLAINT TO DETERMINE DISCHARGEABILITY *IN EVERY IMAGINABLE CIRCUMSTANCE* OTHER THAN THE COURT ITSELF HAVING PROVIDED IMPROPER NOTICE.

Bankruptcy Rule 4007(c) provides:

> A complaint to determine dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of the creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner

> provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Bankruptcy Rule 9006(b)(3) provides:

> The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those rules.

Initially, it cannot be denied that this question of Federal Law has never been settled by the United States Supreme Court. Both the Petitioners and the Respondent have cited a number of lower court cases which have addressed this issue. *See, e.g., Kelly v. Gordon (In re Gordon),* 988 F.2d 1000, 1001 (9th Cir. 1993); *In re Dewalt,* 961 F.2d 848, 850 (9th Cir. 1992); *Sanchez Ramos v. Compton (In re Compton),* 891 F.2d 1180 (5th Cir. 1990); *Byrd v. Alton (In re Alton),* 837 F.2d 457, 459 (11th Cir. 1988); and *Jones v. Hill (In re Hill),* 811 F.2d 484, 486 (9th Cir. 1987). In this case, neither the courts below nor the parties have cited a single case in which the United States Supreme Court has addressed or settled this important question of federal law (however, *see* Part II, hereinafter, in which the Petitioners contend that the United States Supreme Court has rendered a decision which is relevant to this important federal question and as to which the decision herein of the United States Court of Appeals is in conflict).

The question of federal law which is raised in this matter is critically important for at least two reasons.

A. A draconian and dogmatic application of Bankruptcy Rules 4007(c) and 9006(b)(3) in a manner which incorporates imposed judicial blindness and precludes a court's consideration of the factual circumstances which underlie the bald fact that a Complaint has, for some reason, been untimely filed, deprives litigants of important property rights without according to them due process of law.

It is axiomatic that a litigant has a constitutional right to a Court's review of every circumstance which is relevant to a material issue in that litigant's case.

The determination below effectively holds that Bankruptcy Rules 4007(c) and 9006(b)(3) require that the courts entirely disregard any fact which is relevant to the reasons why a Complaint to Determine Dischargeability was not timely filed (other than facts which establish that the court itself provided improper notice).

Therefore, by way of illustration, were a litigant able to establish that a messenger who carried the Complaint for filing had been tragically killed in an accident en route to the courthouse, the courts are required, under the decision below, to disregard that fact entirely and to reach the result that, despite circumstances which were entirely beyond the control of the litigant, his or her property rights must be forfeited and, to the extent of such a forfeiture, the opposing party is to obtain a windfall benefit. Likewise, and by way of further illustration, were the litigant able to establish that the Complaint was not timely filed as a result of the negligence, deceit, and/or other improper conduct of the opposing party (*e.g.*, where, as herein, the opposing party provided the Court with an improper matrix, and, as a result, the Petitioners received no notice from the court as to the bar date), the courts are required, under the decision below, to disregard, that fact entirely and to reach the result that,

despite circumstances which were entirely beyond the control of the litigant and caused wholly or partly by the opposing party, his or her property rights must be forfeited and, to the extent of such a forfeiture, the opposing party is to obtain a windfall benefit. Other illustrative examples of such an absurd result have been cited by the Supreme Court itself in its analysis of excusable neglect situations arising under Bankruptcy Rule 9006(b)(1) (*see* Part II, hereinafter) and by the Court of Appeals for the Ninth Circuit (*see* Part III, hereinafter). Certainly, neither Congress nor the courts ever intended the Bankruptcy Rules to be interpreted and applied in such a draconian, absurd, and clearly unconstitutional manner. In fact, the courts have made it abundantly clear that, particularly in a Bankruptcy context, such results are not to be countenanced.

A "Bankruptcy Court is not a computer and has a duty to see that bankruptcy remains a shield for those in need as Congress and the constitution see that need and not a sword to cut a fraudulent swath of economic disaster." *In re Garland Corp.*, 6 B.R. 452, 455 (Bankr. D. Mass. 1980). "The court has the power to sift the circumstances surrounding any claim to see that injustice and unfairness is not done in the administration of the bankrupt estate." *Id.; In re Karpe*, 84 B.R. 926 (Bankr. M.D. Pa. 1988). Bankruptcy courts are not to read statutory words with a computer's ease, but, instead, are to operate under the overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. *Bank of Marin v. England*, 385 U.S. at 103, 87 S. Ct. at 277, 17 L. Ed. 2d 197 (decided under the Bankruptcy Act but cited with approval under the Bankruptcy Code by several circuits); *In re Briggs Transp. Co.*, 780 F.2d 1339, 1343 (8th Cir. 1985); *In re Triangle Chemicals, Inc.*, 697 F.2d 1280, 1287 (5th Cir. 1983).

To require that a Bankruptcy Court must be blind to the negligence or misconduct of the debtor in causing the late filing

is to improperly hold the creditor "to the highest standards of diligence in a situation caused by negligence of a debtor, and rewarding the debtor, in effect, for negligent filing." *In re Dewalt*, 961 F.2d 848, 850 (9th Cir. 1992).

A Bankruptcy Court should also be able to consider the existence of such equitable circumstances as whether, as herein, the Respondent's counsel was advised that the Complaint to Determine Dischargeability had been sent by overnight mail for filing (*see In re Bartley*, 33 B.R. at 770) or whether, as herein, the Respondent's removal to a Bankruptcy Court of a pending state court action constituted compliance with the requirement that a Complaint to Determine Dischargeability be filed (*see In Re Williams*, 3 B.R. 401 (Bankr. N.D. Ga. 1980)), particularly when the Respondent's counsel has admitted that his purpose in removing the state court action to the federal District Court and, ultimately, to the Bankruptcy Court, was so that it could be heard as a core proceeding as an objection to discharge.

Rule 4007(c) was clearly intended to permit for some enlargement of the filing period because it provides that on the "motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision" (albeit the motion must be made before the time has expired). In addition,courts have already held that Rule 4007(c), despite its language to the contrary, does not preclude a late filing in cases where the Court itself has failed to give notice of, or has given incorrect information about, the filing deadline. *See, e.g., In re Poskanzer,* 146 B.R. 125, 127-28 (D. N.J. 1992); *In re Hershkovitz,* 101 B.R. 816, 819 (Bankr. N.D. Ga. 1989). Furthermore, the United States Court of Appeals for the Ninth Circuit has ruled that circumstances other than the court's having provided improper notice to the creditor can justify the Bankruptcy Court's invoking and exercising its equitable powers to permit additional time to file a Complaint to

Determine Dischargeability (*see In re Dewalt*, 961 F.2d 848 (9th Cir. 1992) and Part III, hereinafter).

Finally, in *In re Channel Home Centers*, 989 F.2d 682 (3rd Cir. 1983), *cert. denied*, 114 S. Ct. 184, 126 L. Ed. 2d 143, The Third Circuit Court of Appeals, in holding that a Bankruptcy Court has the discretion to extend a statutory deadline for assuming or rejecting a lease, recognized that "even unambiguous statutory language need not be followed in those 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Id.* at 687. In the case at bar, the federal question is not even governed by a statute but, rather, by a Bankruptcy Rule of Procedure.

The critical nature and importance of resolving this question of federal law is dramatically illustrated by the application of the decision below to the facts of the case at bar.

The Bankruptcy Court made undisturbed findings of fact which included the following: (1) as the result of the Respondent's own preparation of an improper matrix, the Petitioners had no notice of the bar date (31a); (2) the Petitioners had sent their Complaint for filing in a timely manner and with a recognized delivery agent (32a); (3) the Complaint had been filed one day late merely because the Bankruptcy Court had moved locations and the envelope had been inadvertently addressed to the Bankruptcy Court's prior location at an address set forth in the New Jersey Lawyer's Diary (32a-33a); (4) the Respondent was not prejudiced in any way by the late filing of the Complaint (38a); (5) the Respondent's removal of the state court action to federal court, prior to the bar date, had sufficiently brought the issue within the jurisdiction of the Bankruptcy Court (34a-35a, 38a); and (6) the late filing of the Complaint was the result of excusable neglect (33a).

At the argument of the appeal, the District Court stated that (1) the dismissal of the Complaint would be a rather harsh result under the circumstances of this case (40a); (2) the findings of fact established by the Bankruptcy Court would be good cause for an extension of time (41a); (3) all of the equities were in favor of the Petitioners (42a); (4) the court would like to rule in the Petitioners' favor (43a-44a). At argument, even the Respondent's counsel candidly admitted that the equities were certainly not in his client's favor (44a).

Despite all of these findings, the courts below reversed the Bankruptcy Court based upon a draconian application of Bankruptcy Rules 4007(c) and 9006(b)(3).

B. As applied by the courts below, Bankruptcy Rules 4007(c) and 9006(b)(3) deprive the Bankruptcy Court of equitable powers which it otherwise traditionally and admittedly possesses under federal statute and common law.

11 U.S.C. § 105(a) provides, in relevant part, that "the Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This federal statute recognizes the long-standing common law rule that the Bankruptcy Court is a court of equity and is free to apply equitable principles when the circumstances so demand. *See, e.g., Pepper v. Litton,* 308 U.S. 295 (1939); *Bank of Marin v. England,* 385 U.S. 99, 103, 87 S. Ct. 274, 277, 17 L. Ed. 2d 197 (1966).

The Bankruptcy Court is possessed of both inherent powers and those conferred upon it by 11 U.S.C. § 105 which may be utilized to neutralize inequitable conduct which works a hardship upon parties to a proceeding. *In re Small,* 38 B.R. 143, 147 (Bankr. Md. 1984). "It is well accepted that the bankruptcy

court is guided by the principles of equity, and that the Court will act to assure that 'fraud will not prevail, *that substance will not give way to form,* that technical consideration will not prevent substantial justice from being done." *In re Pace,* 130 B.R. 338, 340 (Bankr. N.D. Fla. 1991), citing *In re International Horizons, Inc.,* 751 F.2d 1213, 1216 (11th Cir. 1985) (emphasis in original). In *Matter of Hershkovitz,* 101 B.R. 816, 819 (Bankr. N.D. Ga. 1989), the court recognized that there are circumstances which warrant the exercise of a Bankruptcy Court's discretion under § 105 to allow a late filing when the plaintiff would suffer a great injustice. Neither the Bankruptcy Code nor its legislative history evidence any intent of the drafters to restrict the Bankruptcy Court's inherent powers. *In re Coram Graphic Arts,* 11 B.R. 641, 644 (Bankr.N.Y. 1981).

Bankruptcy courts have not been deprived of their equitable powers in similar circumstances. For example, Rule 4003, relating to the filing of objections to exemptions, contains language substantially similar to Rule 4007 and, yet, various decisions involving such objections which were filed late, have held that Courts have the discretion to allow for late filings if the equities of a particular case warrant such action. *See, e.g., Matter of Cipa,* 11 B.R. 968, 970 (Bankr. W.D. Pa. 1981); *Ragsdale v. Genesco, Inc.,* 674 F.2d 277, 278 (4th Cir. 1982); and *In re Bartley,* 33 B.R. 768, 770 (Bankr. E.D.N.Y. 1983). In *Ragsdale,* 674 F.2d at 278, the court held that "the allowance of a late filing is a matter vested in the discretion of the Bankruptcy Judge."

Since it is obvious that the court below has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court, the Supreme Court should grant a Writ of Certiorari.

II.

A WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

The Bankruptcy Court, in exercising its equitable powers under 11 U.S.C. § 105 and the commonl law to allow for the late filing of the Petitioners' Complaint to Determine Dischargeability, found that there was excusable neglect under the dictates of *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 113 S. Ct. 1489, 1498 (1993) (37a-38a), in which the United States Supreme Court employed a test (originally set forth in *In re Dix*, 95 B.R. 134, 138 (9th Cir. B.A.P. 1988)) which weighed the following factors:

> (1) whether granting the delay will prejudice the debtor;
>
> (2) the length of the delay and its impact on efficient court administration;
>
> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; and
>
> (4) whether the creditor acted in good faith.

In *Dix*, the court, having established excusable neglect, had allowed a creditor to file a Complaint Objecting to Dischargeability a full two years after the bar date. In *Pioneer*, the United States Supreme Court found examples of neglect and permitted a delay of twenty (20) days in the filing of Proofs of Claim under Bankruptcy Rule 9006(b)(1), stating:

> There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may *choose* to flout a deadline. In between lie cases where a party may choose to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

Id. at 1494 (emphasis in original).

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. [Footnote omitted.] These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceeding, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 1498.

It is respectfully submitted that the principles of *Pioneer* are relevant to this case and were required to be considered and applied by the courts below. In fact, the United States Court of Appeals for the Ninth Circuit has already applied equitable principles to Rule 4007(c) (*see* Part III, hereinafter). To refuse to do so where the events causing the delay in filing are completely out of a party's control or are caused, in whole or part, by the opposing party, deprives the non-complying party of due process of law. The Bankrupty's Court's findings of fact established that the delay in filing was caused by events completely out of the Petitioners' control and were caused, in substantial part, by the Respondent's negligence in filing an improper addess matrix with the Bankrupty Court Clerk (31a).

The courts below, in refusing to apply the above-referenced Supreme Court standards of excusable neglect which, were found, by the Bankruptcy Court, as an undisturbed fact, to have been established by the Petitioners in this case, have decided an important federal question in an manner which conflicts with *Pioneer,* a clearly relevant decision of the United States Supreme Court. Therefore, the Supreme Court should grant a Writ of Certiorari.

III.

A WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEAL ON THE SAME IMPORTANT MATTER.

As noted heretofore, the decision of the United States Court of Appeals for the Third Circuit essentially holds that Bankruptcy Rules 4007(c) and 9006(b)(3) prohibit a Bankruptcy

Court from exercising its equitable powers to extend the time permitted for filing a Complaint to Determine Dischargeability in every imaginable circumstance other than the Court itself having provided improper notice.

To the contrary, the United States Court of Appeals for the Ninth Circuit has determined that a court must, in appropriate circumstances, consider factors other than the court's own failure to provide proper notice in a case where a Complaint to Determine Dischargeability has been untimely filed.

In *In re Dewalt,* 961 F.2d 848 (9th Cir. 1992), the debtor failed to properly schedule the plaintiff creditors; however, the creditors admittedly learned of the bankruptcy filing a full seven days before the bar date and, according to the factual findings of the Bankruptcy Court, "had enough time to seek an extension of time pursuant to Rule 4007(c), before the bar date passed". *Id.* at 850. Therefore, applying the seemingly literal dictates of Rule 4007(c) (as the courts below did in this case), the Bankruptcy Court dismissed the Complaint as untimely and its decision was affirmed by the Bankruptcy Appellate Panel (107 B.R. 719).

Upon reviewing all of the factual circumstances, the Court of Appeals held that:

> This interpretation unfairly punishes creditors, holding them to the highest standards of diligence in a situation caused by negligence of a debtor, and rewarding the debtor, in effect, for negligent filing. *Id.* at 850.

The Court, noting that there was no evidence that the creditors had intentionally refrained from asserting their claims and recognizing that the creditors had received notice of the

Bankruptcy filing only seven days prior to the bar date, reversed the Bankruptcy Court and the Bankruptcy Appellate Panel and ruled that the Complaint should not have been dismissed. In the case at bar, it was clearly established that the Petitioners had not intentionally refrained from asserting their claims and had, in fact, forwarded a Complaint for filing with the Bankruptcy Court.

Clearly, therefore, there is a conflict in Court of Appeals' decisions as to whether certain factual circumstances (which involve factors other than the Court's having provided improper notice to the creditor) may justify the Bankruptcy Court's invoking and exercising its equitable powers to permit additional time to file a Complaint to Determine Dischargeability. In short, the Ninth Circuit has applied *Pioneer*-like factors (although *Dewalt* was decided before *Pioneer*) and the Third Circuit has not done so.

Inasmuch as the decision below is in conflict with the decision of another United States Court of Appeal on the same important matter, the Supreme Court should grant a Writ of Certiorari.

CONCLUSION

The decision below (a) decides an important question of federal law that has not been, but should be, settled by the United States Supreme Court, (b) is in conflict with a relevant decision of the United States Supreme Court and (c) is in conflict with the decision of another United States Court of Appeals on the same important matter. Therefore, it is respectfully submitted that the Supreme Court should review this matter and grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5331

In Re:

DONALD EDWARD HAMER,

Debtor

BERDJ MOVSESIAN; ADRIENNE MOVSESIAN; NOUBAR MAHDESSIAN; ANN MAHDESSIAN; A & N, INC.; BERDJ & NOUBAR CORP.,

Appellants

v.

DONALD EDWARD HAMER

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 95-CV-00081)

District Judge: Honorable Dickinson R. Debevoise

Submitted Under Third Circuit LAR 34.1(a)
Tuesday, March 12, 1996

Before: NYGAARD, SAROKIN
and ALDISERT, *Circuit Judges*

Appendix A

JUDGMENT ORDER

After consideration of the contentions raised by appellants, Berdj Movsesian; Adrienne Movsesian; Noubar Mahdessian; Ann Mahdessian; A & N, Inc.; and Berdj & Noubar Corp., it is hereby adjudged and ordered that the judgment of the district court dated April 10, 1995 be and the same is hereby affirmed.

Costs taxed against appellants.

By the Court,

s/ H. Lee Sarokin
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: MAR 28 1996

Certified as a true copy and issued in lieu
of a formal mandate on April 19, 1996.

Teste: s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 13, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 95-81

IN RE DONALD E. HAMER

BERDJ MOVSESIAN, ADRIENNE MOVSESIAN, NOUBAR MAHDESSIAN, ANN MAHDESSIAN, A & N, INC., and BERDJ & NOUBAR CORP.,

Plaintiffs/Appellees,

vs.

DONALD E. HAMER,

Defendant/Appellant.

John J. Markwardt, Esq.
Tina L. Colman, Esq.
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Sturbridge Office Park, Suite 1203
180 Route 73 North
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Attorneys for the Plaintiffs/Appellees

Appendix B

Bruce D. Gordon, Esq.
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Attorneys for the Defendant/Appellant

Debevoise, Senior District Judge.

OPINION

This an appeal of a decision of the bankruptcy court. The question on appeal is whether the bankruptcy court erred in not dismissing plaintiffs' Complaint to Determine Dischargeability for late filing. For the reasons set forth below, the decision of the bankruptcy court is reversed.

BACKGROUND

On March 5, 1990, Berdj Movsesian, Adrienne Movsesian, Noubar Mahdessian, Ann Mahdessian, Berdj & Noubar Corporation, and A & N Inc. ("plaintiffs"), instituted a lawsuit in the Superior Court of New Jersey, Law Division, Camden County, against Donald E. Hamer, and Route 541-23, Inc. ("Rt. 541") and Mt. Holly Car Wash, Inc. ("Mt. Holly"), companies which were wholly owned by Hamer. The plaintiffs alleged, *inter alia*, fraud, misrepresentation, and violation of the New Jersey Consumer Fraud Act by Hamer in connection with Hamer's sale to the plaintiffs of a car wash business and the underlying real property.

On October 25, 1993, Hamer, Rt. 541, and Mt. Holly filed Chapter 11 bankruptcy petitions with the Bankruptcy Court. The

state court action of plaintiffs was removed to the United States District Court for the District of New Jersey, and pursuant to the local rules, were referred to the bankruptcy court. The first creditors' meeting was scheduled for December 27, 1993. Although counsel for the plaintiffs did not receive the court's notification of the meeting because the notice sent did not include name of counsel in the address, counsel for plaintiffs attended the creditor's meeting. Under Bankruptcy Rule 4007(c), 60 days after the first creditors' meeting, all creditors were required to file a Complaint to Determine Dischargeability of debt. Therefore, a deadline was set for February 25, 1994.

Plaintiffs filed a Complaint to Determine Dischargeability with the bankruptcy court on February 28, 1994. The Complaint was filed one day later than the filing deadline, taking into consideration the weekend.

On March 29, 1994, Hamer filed a motion to dismiss the adversary proceeding because the Complaint was filed after the deadline to do so. In response to the dismissal motion, the plaintiffs filed a Certification of Jennifer P. Iommie dated April 11, 1994 in which she stated that the reason the Complaint was sent to the Bankruptcy Court late was because she "looked in a book where [she] had the Court's address and [she] addressed the package to said address." She was "not aware that, since so listing the address, the Court had moved across the street . . . ."

On September 8, 1994, the Bankruptcy Court heard oral argument with respect to the dismissal motion and thereafter entered its opinion on the record denying the dismissal motion. The bankruptcy court ruled that plaintiffs' late filing of the Complaint was excusable neglect. An order was entered on September 28, 1994.

Appendix B

Hamer filed a motion for reconsideration on September 26, 1994. At the hearing on the Reconsideration Motion on November 1, 1994, the Bankruptcy Court heard oral argument and thereafter entered its opinion on the record denying the Reconsideration Motion. The Order Denying Motion for Reconsideration was subsequently entered on November 14, 1994.

The bankruptcy court gave three reasons for its denial of defendant's motion to dismiss. The first was the fact that the notification sent to plaintiffs' counsel did not include counsel's name on the address. The second was that, although plaintiffs sent their Complaint to the bankruptcy court on time, they used the old address of the bankruptcy court on the envelope and so the Complaint did not reach the bankruptcy court until the next day. The third is that the defendant removed the matter with the plaintiffs from state court to the bankruptcy proceeding, and therefore the defendant had notice of the plaintiffs' claim. *See* Transcript Proceedings of before Bankruptcy Judge Tuohey at 67-69 (Nov. 1, 1994).

STANDARD ON APPEAL

The proper standard of review to be applied by a district court when reviewing a ruling of a bankruptcy court is determined by the nature of the issues presented on appeal. The factual determinations of the bankruptcy court are to be given conclusive effect unless they are "clearly erroneous." *See Landon v. Hunt*, 977 F.2d 829, 830 (3d Cir. 1992); *J.P. Fyfe, Inc. v. Bradco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989); *In re Morrissey*, 717 F.2d 100, 104 (3d Cir. 1983); *Mellon Bank v. Makoroff*, 153 B.R. 155, 157 (W.D. Pa. 1993); *In re Continental Airlines*, 150 B.R. 334, 336 (D. Del. 1993). Legal conclusions of

the bankruptcy court, on the other hand, are to be accorded no deference and are subject to *de novo* or plenary review by the district court. *See Landon*, 977 F.2d at 830; *J.P. Fyfe*, 891 F.2d at 69; *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988); *Mellon Bank*, 153 B.R. at 157; *Continental Airlines*, 150 B.R. at 336.

Although the bankruptcy court made factual findings, the dispositive issue involves a legal determination, namely, whether a bankruptcy judge can extend the time for filing a complaint to determine dischargeability under Bankruptcy Rule 4007(c) for excusable neglect absent a motion to extend the time made before its expiration. Thus the bankruptcy court's decision is subject to *de novo* review.

DISCUSSION

On appeal to this court is the following issue: Whether a bankruptcy court can allow a plaintiff to file a Complaint to Determine Dischargeability ("Complaint") late if the late filing was the result of excusable neglect. I hold that a bankruptcy court cannot allow a plaintiff to file a late Complaint, even if excusable neglect is found to exist, unless the plaintiff follows the procedure set out in Bankruptcy Rule 4007(c). Because the plaintiffs in this case filed late, and failed to follow Bankruptcy Rule 4007(c), the bankruptcy judge erred when he did not grant the defendant's motion dismiss their Complaint. The bankruptcy judge's decision to relieve plaintiffs of the filing deadline by use of excusable neglect violated the Bankruptcy Rules.

Under Bankruptcy Rule 4007(c), the filing deadline for a Complaint is 60 days after the first creditors' meeting. In this case, the creditors' meeting was on December 27, 1993.

Therefore the deadline for filing the Complaint was set at February 25, 1994. Although plaintiffs failed to meet this deadline, the bankruptcy court denied defendant's motion to dismiss the Complaint, ruling that plaintiffs' failure to meet the deadline was excusable neglect. This decision, however, is contrary to a plain reading of the Bankruptcy Rules.

Bankruptcy Rule 4007(c) states as follows:

> A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of the creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Bankruptcy Rule 4007(c). Rule 4007(c) is clear: a party may file a late Complaint with the court, but only if the party first moves to extend the time period for filing.

Bankruptcy Rule 9006(b) governs enlargement of time periods under the Bankruptcy Rules. Subsection (1) covers filing extensions generally:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or

> allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Bankruptcy Rule 9006(b)(1). Therefore, a bankruptcy court is generally accorded the power to enlarge time periods if excusable neglect is demonstrated. However, this provision is limited by subsections (2) and (3).

Subsection (3) applies to Rule 4007(c). This subsection states as follows:

> The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those rules.

Bankruptcy Rule 9006(b)(3). The power granted by Rule 9006(b)(1) to enlarge applicable time periods if excusable neglect is demonstrated by a party is, by this subsection, explicitly withheld from courts in the context of Rule 4007(c). Subsection (3) only allows a court to enlarge the time period in which to file a Complaint as that rule permits: when a party makes a motion *before* the 60 day time period expires.

The plaintiffs failed to make a motion to extend their time to file a Complaint before the 60 day period expired, and, under

Rule 9006(b), the bankruptcy court is not permitted to take into account excusable neglect to relieve plaintiffs of the deadline. Therefore, the bankruptcy court was in error when it decided that the plaintiffs' failure to file by the February 25, 1994 deadline was excusable neglect.

The holding that a court is only able to relieve a creditor of the filing deadline if a party makes a motion *before* the deadline is further bolstered by the fact that under the former Bankruptcy Rules a court was allowed to relieve a party from a Complaint filing deadline if the court found excusable neglect. *See* former Bankruptcy Rules 409(a)(2) & 906(b). As one judge has stated: "It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim." *In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983).

Although the Third Circuit has not ruled on whether a bankruptcy court can excuse the late filing of a Complaint when a deadline is set pursuant to Rule 4007(c),[1] a number of courts have ruled on this issue. The plaintiffs have failed to cite any case in which a court has ruled under the current Bankruptcy Rules that a court may consider excusable neglect when a creditor failed to file a Complaint within the time allowed under Rule 4007(c).[2] On the other hand, every decision dealing with the

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1. In *In re Poskanzer*, 146 B.R. 125 (D.N.J. 1992), Judge Wolin noted, however, that the Third Circuit "has generally interpreted other Code filing dates strictly. *Id.* at 129-30 (citing *In re Verientes, Ltd.*, 845 F.2d 57 (3d Cir. 1988); *Taylor v. Freeland & Kronz*, 938 F.2d 420 (3d Cir. 1991); *Chrysler Motors Corp. v. Schneiderman*, 940 F.2d 911 (3d Cir. 1991)).

2. Plaintiffs do cite to a number of cases which allow late filings of (Cont'd)

issue at bar has held that excusable neglect cannot be used in the context of Rule 4007(c). *See Kelly v. Gordon (In re Gordon)*, 988 F.2d 1000, 1001 (9th Cir. 1993) (plaintiffs could not be relieved of 4007(c) deadline by showing excusable neglect); *Byrd v. Alton (In re Alton)*, 837 F.2d 457, 459 (11th Cir. 1988) ("The dictates of the Code and Rules are clear. It is not our place to change them. Under Rule 4007(c), any motion to extend the time period for filing a dischargeability complaint must be made before the running of that period."); *Jones v. Hill (In re Hill)*, 811 F.2d 484, 486 (9th Cir. 1987); *In re Poskanzer*, 146 B.R. 125, 127 (D.N.J. 1992) ("A bankruptcy court possesses limited discretion, however, to permit filing beyond the bar date."); *In re Biederman*, 165 B.R. 783, 788 (Bankr. D.N.J. 1994) ("a court has limited discretion to extend the deadlines for filing complaints objecting to the debtor's discharge, or the dischargeability of a creditor's claim and has no jurisdiction for doing so if the request for an extension is made after the deadline has expired"); *In re Jeffrey*, 169 B.R. 25, 27 (Bankr. D. Md. 1994) ("the Court is powerless to extend the deadline"); *In re Klein*, 64 B.R. 372, 376 (Bankr. E.D.N.Y.) ("under the new bankruptcy rules, a court cannot allow extension of deadline for excusable neglect"). In addition, courts have also held that excusable neglect cannot be used under Rule 4004(a). *See, e.g., In re McDowell*, 57 B.R. 310

(Cont'd)

objections to exemptions upon the demonstration of inequities. *See* Plaintiffs' Brief at 14 (*citing Matter of Cipa*, 11 B.R. 968, 970 (Bankr. W.D. Pa. 1981); *Ragsdayle v. Genesco, Inc.*, 674 F.2d 277, 278 (4th Cir. 1982); *In re Bartley*, 33 B.R. 768, 770 (Bankr. E.D.N.Y. 1983)). The plaintiffs' argument by analogy to the filing of a Complaint is not necessarily a bad one. However, the plaintiffs' citation to law prior to the adoption of the current Bankruptcy Rules is problematic because Congress has done away with the excusable neglect standard in the context of the filing of objections as well. *See* Bankruptcy Rule 4003.

(Bankr. M.D. Penn.) ("this court lacks authority to grant untimely requests for extensions even where the requests are late due to alleged excusable neglect"); *In re Smithuysen*, 54 B.R. 661 (Bankr. D. Md. 1985) ("[t]his Court is quite restricted in its discretion to enlarge the time period to permit [plaintiff] to file his complaint").

The only situation in which courts have held that a party can file a late Complaint is where the court itself failed to give the party notice of the creditors' meeting or gave incorrect information about the filing deadline. *See, e.g., In re Poskanzer*, 146 B.R. at 127-28; *In re Hershkovitz*, 101 B.R. 816, 819 (Bankr. N.D. Ga. 1989) ("this Court finds that it would be a great injustice if Plaintiffs were precluded from maintaining their dischargeability complaint against Defendant-Debtor simply because they relied on an order of the court which was erroneously entered").

In *Poskanzer*, Judge Wolin explained as follows:

> A bankruptcy court possesses limited discretion, however, to permit filing beyond the bar date. Bankr.R. 9006(b)(3). A creditor's receipt of inadequate notice represents one instance where courts have traditionally extended the time to file the complaint. But this discretion is limited. More specifically, section 523(a)(3)(B) of the Code tempers the discretion permitted under the Bankruptcy Rules by limiting late filing only to those creditors who lack notice or actual knowledge of the case to permit timely filing. A plain-reading of the Code and

> the Bankruptcy Rules suggests that a creditor's possession of actual knowledge of the case vitiates an inadequately noticed creditor's ability to file out of time.

Id. (footnotes omitted).

In other words, absent moving for an extension of time as provided in Rule 4007(c), a creditor can only file a Complaint past the deadline if the plaintiff failed to receive a notice from the court or actual notice of the proper deadline. Allowing a creditor without notice to file past the deadline is not a back door way of permitting excusable neglect, however. A creditor without notice of the deadline has not even had the opportunity to commit neglect, and it would be unfair (and a violation of due process) to bar that creditor from bringing a claim without notification of the deadline to file a Complaint.

In the case at bar, plaintiffs assert that they never received the notification of the deadline from the court because their lawyer's name was not included as part of the address. However, as the bankruptcy judge noted, the plaintiffs obviously had actual notice of the deadline for the filing of their Complaint against defendant because their attorney attended the December 27, 1993 creditors' meeting. In light of the fact that plaintiffs had actual notice of the February 25, 1994 filing deadline, plaintiffs cannot file late.

Although barring the plaintiffs from filing a Complaint in this case may seem inequitable, Congress has not provided for any other result. In a case construing the Federal Rules of Civil Procedure in which a similar result was reached, the Supreme Court declared: "Of course there is an element of arbitrariness

here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process." *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986). *See also, Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). In addition, the Third Circuit has acknowledged that the purpose of the Code and the Bankruptcy Rules in refusing to permit a late filing: "[T]he time limits of the statute and bankruptcy rule 'serve the dual purposes of finality and certainty. In the bankruptcy context, the need for finality and certainty is especially acute.' While we recognize that our result could grant a debtor an 'undeserved windfall' we point[ ] out that '[t]hat is true on enforcement of all procedural rules.' " *Chrysler Motors Corp. v. Schneiderman*, 940 F.2d 911, 914 (3d Cir. 1991).

CONCLUSION

The bankruptcy court erred in not dismissing plaintiffs' Complaint to Determine Dischargeability for failure to file it within the time required under the Bankruptcy Rules. The matter will be remanded to the bankruptcy court for dismissal in accordance with this opinion. An appropriate order follows.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.D.J.

Date: April 10, 1995

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 95-81

IN RE DONALD E. HAMER,

BERDJ MOVSESIAN, ADRIENNE MOVSESIAN, NOUBAR MAHDESSIAN, ANN MAHDESSIAN, A & N, INC., AND BERDJ & NOUBAR CORP.,

Plaintiffs/Appellees,

vs.

DONALD E. HAMER,

Defendant/Appellant.

ORDER

This matter having been appealed to the court by Okin, Cohen & Hollander, counsel for Donald E. Hamer; and the court having considered all papers submitted; and in accordance with the opinion of even date;

IT IS on this 10th day of April 1995

ORDERED that this matter be remanded to the bankruptcy court and that the plaintiffs' Complaint to Determine Dischargeability of debt be dismissed by the bankruptcy court.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 14, 1994

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 93-28491
Chapter 11

Adv. No. 94-2126

Hearing: November 1, 1994

In re:

Donald Edward Hamer,

Debtor.

Berdj Movsesian, et al.,

Plaintiffs,

vs.

Donald E. Hamer,

Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter having come before the court on November 1, 1994, on motion of the debtor for reconsideration of this court's

bench opinion of September 8, 1994, memorialized in order dated September 29, 1994; and the debtor/defendant being represented by Bruce Gordon, Esquire of Okin, Cohen & Hollander; and creditor/plaintiffs being represented by John Markwardt, Esquire, Markwardt Professional Association; and the court having listened to the argument of counsel and having reviewed the papers filed; and for the reasons stated in this court's bench opinion of November 1, 1994;

IT IS, on this 14th day of November, 1994;

ORDERED, that the motion of the debtor for reconsideration be and it is hereby denied.

s/ William F. Tuohey
WILLIAM F. TUOHEY
U.S. Bankruptcy Judge

Copy of within order mailed to:

Okin, Cohen & Hollander
One Parker Plaza
Fort Lee, NJ 07024

Markwardt Professional Association
Sturbridge Office Park, Suite 1203
180 Route 73 North
Voorhees, NJ 08043-9595

APPENDIX D — OMNIBUS ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY FILED SEPTEMBER 29, 1994

OKIN, COHEN & HOLLANDER
Attorneys for the Debtor
One Parker Plaza
Fort Lee, New Jersey 07024
(201) 947-7500
Bruce D. Gordon, Esq.
BG-8018

HEARING DATE: SEPTEMBER 8, 1994

UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF NEW JERSEY

CHAPTER 11

Case No. 93-28491 (WFT)

In re:

DONALD EDWARD HAMER,

Debtor.

CHAPTER 11

CASE NO. 93-28490 (WFT)

In Re:

MT. HOLLY CAR WASH, INC.,

Debtor.

Appendix D

CHAPTER 11

CASE NO. 93-28489 (WFT)

In Re:

RT. 541-23, INC.,

Debtor.

NON JOINTLY ADMINISTERED CASES. DUPLICATE ORIGINAL ORDER TO BE FILED AND DOCKETED IN EACH CASE AND IN ADVERSARY PROCEEDINGS NUMBERED: 94-2126, 94-2070, 94-2071, 94-2074, 94-2075

OMNIBUS ORDER WITH RESPECT TO HEARING OF SEPTEMBER 8, 1994

The following matters having been opened to the Court for a hearing on September 8, 1994:

Calendar Number 20: Case number 93-28491. Motion to dismiss case; for relief from the stay; for abstention as to state court matters; for remand of state court matters. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, *et al.*

Calendar Number 21: Case number 93-28491; adversary proceeding number 94-2126. Cross motion recognizing timeliness of filing of complaint to determine dischargeability; extending date to file complaint; permitting *nunc pro tunc* filing of complaint; providing for service of complaint by regular mail;

permitting amendment of compliant to plead fraud with more particularity. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

Calendar Number 22: Case Number 93-28491; adversary proceeding number 94-2126. Motion to dismiss complaint for failure to file in time; to dismiss complaint for failure to state a cause of action under Bankruptcy Code section 727; to dismiss complaint for failure of service of process. Filed by Okin, Cohen & Hollander (Bruce D. Gordon, Esq. and Allan Young, Esq. appearing) on behalf of the Debtor Donald E. Hamer.

Calendar Number 23: Case number 93-28491; adversary proceeding number 94-2071. Motion for abstention and remand of removed cases. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Francis P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

Calendar Number 24: Case number 93-28491. Motion to vacate automatic stay. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Frances P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

Calendar Number 25: Case number 93-28490. Motion for second order extending time to file a plan. Filed by Hanly & Ryglicki (Jack Gillman, Esq. appearing) on behalf of the Debtor Mt. Holly Car Wash, Inc.

Calendar Number 26: Case number 93-28490. Motion to dismiss case; for relief from stay; for abstention as to state court matters; for remand of state court matters. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

Appendix D

Calendar November 27: Case number 93-28490. Motion to vacate automatic stay. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Frances P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

Calendar Number 28: Case number 93-28489. Motion to vacate automatic stay. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Frances P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

Calendar Number 29: Case number 93-28489. Motion for second order extending time to file a plan. Filed by Hanly & Ruglike (Jack Gillman, Esq. appearing) on behalf of the Debtor Rt. 541-23, Inc.

Calendar Number 30: Case number 93-28489. Motion to dismiss case; for relief from stay; for abstention as to state court matters; for remand of state court matters. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

Calendar Number 31: Case number 93-28491. Motion for an order estimating claim pursuant to §502(c) of the Bankruptcy Code. Filed by Okin, Cohen & Hollander (Bruce D. Gordon, Esq. and Allan Young, Esq. appearing) on behalf of the Debtor Donald E. Hamer.

Calendar Number 32: Case number 93-28491. Motion for an order expunging claim. Filed by Okin, Cohen & Hollander (Bruce D. Gordon, Esq. and Allan Young, Esq. appearing) on behalf of the Debtor Donald E. Hamer.

Appendix D

Calendar Number 33: Case number 93-28491. Motion to consolidate case number 93-28491 with case number 93-28489 and 93-28490. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

Calendar Number 34: Case number 93-28491; adversary proceeding number 94-2126. Pre-trial conference.

And all moving parties having appeared at the hearing on September 8, 1994 and in addition Dina Hamer having appeared by her attorneys Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime (Mark Baumgarten, Esq. appearing), and all parties having had an opportunity to be heard, and upon the transcript of the hearing with respect to all calendared matters set forth above,

It is on this 29th day of September, ordered as follows:

1. *Calendar Number 20*:

> Case number 93-28491. Motion to dismiss case; for relief from the stay; for abstention as to state court matters; for remand of state court matters. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, *et al.*

Based upon the opinion of the Court set forth on the record, the Court hereby abstains from jurisdiction over the following adversary proceedings.

a. *Hamer v. A&N Inc., et al.*, Adv. Pro. No. 94-2070;

b. *Fidelity Bank v. A&N Inc.*, Adv. Pro. No. 94-2071;

c. *Movsesian v. Hamer*, Adv. Pro. No. 94-2074;

d. *Hamer v. A&N Inc.*, Adv. Pro. No. 94-2075.

Abstention is granted pursuant to 28 U.S.C. §1334(c)(1). Because abstention is granted pursuant to this order, the adversary proceedings set forth in this paragraph are remanded to the state court from which they were removed for continuation of the proceedings that were previously stayed. All other relief sought in this motion is denied.

At the conclusion of the proceedings in the actions remanded hereby, this Court shall review same, pursuant to *In re Braen* 900 F.2d 621 (3d Cir 1990), in connection with adversary proceeding number 94-2126.

A stay of the remand granted hereby is hereby imposed for a period of thirty days from the date hereof so that any party may seek review of this order.

2. *Calendar Number 21*:

> Case number 93-28491; adversary proceeding number 94-2126. Cross motion recognizing timeliness of filing of complaint to determine dischargeability; extending date to file complaint; permitting *nunc pro tunc* filing of complaint; providing for service of complaint by regular mail; permitting amendment of compliant to plead

fraud with more particularity. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

Based upon the opinion of the Court set forth on the record, the Court hereby permits the late filing of the complaint in adversary proceeding number 94-2126. All other relief sought in this motion is denied.

3. *Calendar Number 22*:

Case Number 93-28491; adversary proceeding number 94-2126. Motion to dismiss complaint for failure to file in time; to dismiss complaint for failure to state a cause of action under Bankruptcy Code section 727; to dismiss complaint for failure of service of process. Filed by Okin, Cohen & Hollander (Bruce D. Gordon, Esq. and Allan Young, Esq. appearing) on behalf of the Debtor Donald E. Hamer.

Based upon the opinion of the Court set forth on the record, the Court hereby denies the motion to dismiss adversary proceeding number 94-2126. The motion to dismiss the complaint for failure to state a claim number §727 of the Bankruptcy Code and for improper service of process is adjourned without date.

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4. *Calendar Number 23*:

> Case number 93-28491; adversary proceeding number 94-2071. Motion for abstention and remand of removed cases. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Francis P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

The motion is granted for the same reasons set forth in decretal paragraph number 1 regarding calendar number 20.

5. *Calendar Number 24*:

> Case number 93-28491. Motion to vacate automatic stay. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Frances P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

Based upon the opinion of the Court set forth on the record, the Court hereby denies the motion to vacate the automatic stay, except that the automatic stay is terminated with respect to the mortgage and security interests held by the Debtors against the real and personal property located at Route 541 Burlington — Mt. Holly Rd., Westhampton, New Jersey being Block 1203, Lot 23 on the tax map of the township of Westhampton (the "Property").

Fidelity is hereby permitted to foreclose the interests of the Debtors in the Property pursuant to state law.

Appendix D

In the event that the Sheriff's sale of the Property yields a surplus in excess of the amount due Fidelity as determined in the State Court foreclosure proceeding, then such surplus proceeds are to be paid to the Clerk of the United States Bankruptcy Court to be held by the Clerk until further order of this Court.

6. *Calendar Number 25*:

> Case number 93-28490. Motion for second order extending time to file a plan. Filed by Hanly & Ruglike (Jack Gillman, Esq. appearing) on behalf of the Debtor Mt. Holly Car Wash, Inc.

This motion is moot because of the filing of a plan of reorganization.

7. *Calendar Number 26*:

> Case number 93-28490. Motion to dismiss case; for relief from stay; for abstention as to state court matters; for remand of state court matters. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

The motion is granted and denied for the same reasons set forth in decretal paragraph number 1 regarding calendar number 20.

Appendix D

8. *Calendar Number 27:*

> Case number 93-28490. Motion to vacate automatic stay. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Frances P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

The motion is denied for the same reasons set forth in decretal paragraph number 5 regarding calendar number 24 with the same exceptions.

9. *Calendar Number 28:*

> Case number 93-28489. motion to vacate automatic stay. Filed by Jubanyik, Varbalow, Tedesco, Shaw & Shaffer (Frances P. Maneri, Esq. appearing) on behalf of Fidelity Bank, N.A.

The motion is denied for the same reasons set forth in decretal paragraph number 5 regarding calendar number 24 with the same exceptions.

10. *Calendar Number 29:*

> Case number 93-28489. Motion for second order extending time to file a plan. Filed by Hanly & Ruglike (Jack Gillman, Esq. appearing) on behalf of the Debtor Rt. 541-23, Inc.

Appendix D

This motion is moot because of the filing of a plan of reorganization.

11. *Calendar Number 30*:

> Case number 93-28489. Motion to dismiss case; for relief from stay; for abstention as to state court matters; for remand of state court matters. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

The motion is granted and denied for the same reasons set forth in decretal paragraph number 1 regarding calendar number 20.

12. *Calendar Number 31*:

> Case number 93-28491. Motion for an order estimating claim pursuant to §502(c) of the Bankruptcy Code. Filed by Okin, Cohen & Hollander (Bruce D. Gordon, Esq. and Allan Young, Esq. appearing) on behalf of the Debtor Donald E. Hamer.

This motion is adjourned without date.

13. *Calendar Number 32*:

> Case number 93-28491. Motion for an order expunging claim. Filed by Okin, Cohen &

Hollander (Bruce D. Gordon, Esq. and Allan Young, Esq. appearing) on behalf of the Debtor Donald E. Hamer.

This motion is denied without prejudice.

14. *Calendar Number 33*:

Case number 93-28491. Motion to consolidate case number 93-28491 with case number 93-28489 and 93-28490. Filed by Markwardt Professional Association (John J. Markwardt, Esq. appearing) on behalf of Berdj & Adrienne Movsesian, et al.

This motion is denied without prejudice.

15. *Calendar Number 34*:

Case number 93-28491; adversary proceeding number 94-2126. Pre-trial conference.

Based upon the relief granted in this order the pretrial conference is moot.

16. A duplicate original of this order shall be filed and docketed in each of the above-captioned cases and the following adversary proceedings without the need for separate orders:

Appendix D

94-2126
94-2070
94-2071
91-2074
94-2075

s/ William F. Tuohey
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E — EXCERPTS OF TRANSCRIPTS OF PROCEEDINGS OF SEPTEMBER 8, 1994 (pp. 53-60); NOVEMBER 1, 1994 (pp. 61-63); APRIL 10, 1995 (pp. 6-13)

[Commencing at page 53]

Movsesian.

Now, it is conceded that the — strike the word conceded.

I find, based on my review of the 341 notice to creditors, in Donald Hamer's Chapter 11, as well as my review of the bankruptcy schedules, that the Movsesian Defendants addresses were not properly listed in the initial bankruptcy filing by Hamer; therefore, I also have reviewed the Clerk's notice for the 341 meeting in the Hamer case, and while that Clerk's notice does fix a date for a first meeting of creditors, namely December 27, 1993, and while said notice does contain a bar date for the filing of objections to discharge, namely February 25, 1994, I find that that original notice was never mailed by the Clerk of the Court and, in fact, there is a notation on the proof of service bearing the names of the Movsesian Plaintiffs that sets forth it was not mailed to them because, while their names are referred to in this list of creditors, no addresses are provided. So because of the failure of Hamer to properly list Movsesian, et al, they did not receive from the Clerk of the Bankruptcy [54] Court the 341 notice.

Nonetheless, I do find, based on the arguments of counsel today, which really didn't appear to be disputed, that a representative, an attorney representing the Movsesian group, did ultimately find out about the 341 meeting, and did ultimately attend the 341 meeting on December 27, 1993.

Now, I also find that the complaint in the objection to discharge case was filed — stamped filed — stop the tape for a minute.

Appendix E

(Discussion held off the record.)

THE COURT: The complaint, adversary 94-2126, it is the complaint to which Debtor Mr. Hamer makes the specific motion to dismiss, that complaint, alleging non-dischargeability issues is filed February 28 at 9:42 A.M. in the Bankruptcy Clerk's office, and I have the original with the stamp file in front of me.

It is also pled in the affidavits in opposition to the motion that February 28, 1994 was a Monday, which it was, and the actual bar date was Friday the 25th.

It is represented by the Movsesian [55] counsel that they handed, on February 25, and I have the affidavit of the secretary for the law firm of the Plaintiff, and I find and I accept that affidavit, that the complaint was delivered to a messenger service for delivery the same day, the 25th, to the courthouse. It was addressed to the Peter Rodino Federal Building in Newark, which is the prior home of the Clerk's office and the Bankruptcy Court.

The Bankruptcy Court, in December of 1993, if memory serves me, moved to its current facility, this current structure. This delivery is approximately 60 days, plus or minus, after the moving of the Court from the Rodino building to this building.

I note that — strike that.

The affidavit would further indicate that the messenger service on Friday the 25th, when they went to the Rodino building, they didn't find the Bankruptcy Court there, there was some confusion. Ultimately, the papers, the following Monday, after the weekend, were delivered to the current courthouse, the

Martin Luther King courthouse, and, as I indicated, were filed on [56] that Monday the 28th by the Clerk of the Court.

It is argued strenuously by Mr. Hamer that the time bar fixed in the statute to file complaints objecting to discharge, that the Court has no discretion in that regard. He argues that the time frames under Rule 9006 — 9004, rather, and 4007, the Court has no discretion.

I disagree. I do not think, in this circuit, that the Court is removed of all discretion.

Obviously, bar dates are extremely serious matters, and the Court should only extend said dates or time frames for cause. I am finding that the facts that I've just recited where the papers were delivered in time to a messenger service, and actually arrived at the building formerly occupied by the Court on the last date, that is within time, only to find the Court had moved within the two-month period to an adjoining building, I am finding that is grounds for excusable neglect so as to cause the Court to exercise equitable relief and to rule that the complaint was filed within time.

I also note in this regard that, in an [57] issue not dealing with non-dischargeability, but dealing with extensions of time, under Rule 9004, Judge Allito in the Third Circuit, in the case of In Re Channel Home Centers, reported in 989 F.2d 682, Third Circuit, 1983, did note that, "Even unambiguous statutory language in the Bankruptcy Code need not be followed in those rare cases in which a literal application of the statute will produce results demonstrably at odds with the intentions of its drafters."

He noted, in analyzing again the period of time to assume or

reject leases, and I realize that is not the time frame that is before me today, but I do think by analogy the logic in Channel does support my conclusion here, Judge Allito in Channel did go on to note that, even after the expiration of the 60-day assumption period, the Court did have discretion to grant an additional extension, if it did so cautiously, prudently and for cause.

Now, I find that initially on the law that I am not barred. I don't think Courts of law, in evaluating statutes of limitations, should be removed of all discretion. Clearly statutes of [58] limitations imposed by Congress are entitled to be enforced, and the parties are entitled to rely on those statutes. But when a party hands papers to a recognized delivery agent, and in the intervening time frame, or recent time frame, the Court itself to whom the parties have addressed the papers have moved, it seems to me the Court under 105, the oft cited equitable section of the Code that this Court has authority under, and under the Supreme Court case of Pepper versus Litton, has authority to grant relief.

Be that as it may, though, and moving beyond that issue, this case as a second and even more compelling reason to cause me to deny the motion to dismiss, and that is the very action of the Debtor in removing a dismissed complaint pending in the state court since 1990 that in a lengthy and complete complaint sets forth specific allegations of fraud that meet the test for non-dischargeability under 523 of the Code. Not saying that — I am not granting summary judgment, but I am saying the allegations meet the standard to survive a summary judgment motion, and to at least set forth cogent allegations of fraud. And [59] this, then, is — one of the reasons, in looking behind statutes of limitations in bankruptcy, one of the fountainhead reasons that we have bar dates is the concept of fresh start.

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The Debtor is to be granted a quick relief, so that he can — he or she can move on with their lives, either through a reorganization or through a liquidation, and that concept of fresh start is one of the primary motivations behind the shortened bar date concept of forcing complaints, objecting to discharge to be placed on a fast track.

However, in this case, since 1990, almost four years prior to the bankruptcy, Mr. Hamer and the corporate Defendants were faced with specific fraud allegations, discovery had taken place, the record supports the conclusion that Mr. Hamer, himself, had been deposed twice, he was scheduled for a third deposition, when he chose to file Chapter 11 and stop that proceeding from going forward.

For all of those reasons, and specifically finding that the removed complaint is, in effect, an objection to discharge [60] complaint, and is a separate and distinct complaint, and was before this Court within the bar date, in other words, the removal occurs in January, prior to the February bar date, and that removal is not by Movsesian, that removal is by Hamer. So Hamer, through his own actions in removing the long-standing fraud complaint to the Bankruptcy Court, within the bar date period, has preserved the rights of Movsesian.

I am consolidating, for purposes of trial, and I rule that the two adversary complaints, the separate complaint filed by Movsesian for non-dischargeability, 94-2074 is here by consolidated with 94-02126 — I have that reversed — 92-02126 is the non-dischargeability separately filed. I am consolidating that with the prior removed state court action, 94-2074. And I am saying that those two consolidated complaints certainly justify denial of this motion.

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Motion to dismiss for all those reasons is denied. Statute of limitations is not imposed on this particular case as a bar.

Now, Court will do its own order.

* * *

Appendix E

[Commencing at page 61]

so-called Bapt decision.

The Supreme Court in *Pioneer*, while they don't marry themselves to the *Dix* test, they say it's not a bad statement of the guidelines. It talks about the trial court coming to the conclusion that the petitioner would not be prejudiced by the late filing, that the 20 day delay in that particular case would have no adverse impact, that the reason for the delay was not outside respondent's control, that respondents and their counsel acted in good faith, and that in light of Berlin's — Berlin being one of the parties in *Pioneer* — business sophistication and actual knowledge of the bar date, the neglect was warranted.

I've analyzed the so-called *Dix* case; I've analyzed the *Pioneer* case. I am finding that a filing the day after the bar date at 9:30 in the morning of a Complaint that raises the self-same fraud issues that have been pending in the State Court for many months certainly is not prejudicial to the debtor. That — we — and I note that the delay in *Pioneer* is 20 days, the delay in *Poskanzer* was several weeks.

The delay in this case is — counsel argues hours, but I question that conclusion. He's saying that the Court — Clerk's office closed at 4:00 on Friday and that 9:23 they're here. So he's arguing that the delay was minutes. It wasn't minutes, but it was only — it was filed on the next available business day, so it's one day late.

[62] I think that is a very narrow tardiness on their part, a very limited tardiness and I — so what I — in conclusion, to put a fine point on it after reviewing the test in *Pioneer* that a court

must reach to come to an excusable neglect argument, I conclude that the — on balance that the findings support a holding in favor of the Movsesian clients. I don't find prejudice to the debtor. I find a de minimus delay. I find no surprise.

These issues have been pending in the State Court forum. I find that there are reasons for the delay; the misaddressed envelope and the failure to — there's no record that they received the bar date. And then I find, finally, as to the removal issue, I find that having done that, the fraud case was brought to this Court by the debtor himself within the bar date and under res judicata, estoppel — a collateral estoppel, I find that the debtor defeated his ability to stand on the so-called brightline ruling.

Now obviously, I come to this decision after careful consideration of the facts in the cases, particularly *Pioneer*, and therefore all these reasons and limit — and I want to make it clear that I am not going to publish this opinion because this is a unique case with a multi-headed equitable problem, that the Court confronted the three basic areas that I've talked about, I still feel that strict enforcement of these regulations is important. However, I do feel that the Court is [63] a court of equity and there has to be discretion in some scenarios and I find that the multitude of events that came together to cause this matter to be one day late justifies the Court in exercising its equitable powers.

Motion denied, original ruling stands. I'll prepare a one line order. It'll simply say incorporate this ruling today by reference and deny reconsideration. It's a good argument. Thank you everybody.

MR. MARKWARDT: Thank you, Your Honor.

MR. GORDON: Thank you, Your Honor.

THE COURT: I need all those exhibits back now. They're the Court's exhibits.

(Hearing concluded.)

I, Susan R. Wompierski, certify that the foregoing is a correct transcript from the electronic sound recording of proceedings in the above entitled matter.

s/ Susan R. Wompierski — 2/2/95
Susan R. Wompierski — Date
L.B.S., Inc.

Appendix E

[Commencing at page 6]

there was improper notice to the Markwardt clients, found that it was excusable neglect to file the complaint late. It was also error for the Bankruptcy Court to apply an excusable neglect standard under Bankruptcy Rule 4007(c) to excuse the late filing of the complaint because the envelope was misaddressed.

Hamer set forth a detailed analysis of the application of the excusable neglect standards under Bankruptcy Rules 4007(c) and 9006(b)(1) and 9006(b)(3) which are the bankruptcy — applicable bankruptcy rules which are related to the decision before the Court today.

This analysis shows that Congress has granted no discretion to the Bankruptcy Court to allow the late filing of the complaint under Rule 4007(c) based upon excusable neglect.

Legions of Courts cited by Hamer agree with this analysis. The Third Circuit has also agreed with this analysis in the Taylor case cited by Hamer which dealt with the strict deadlines set forth in Bankruptcy Rule 9006(b)(3) under Rule 4003.

THE COURT: It's a rather harsh result in this case.

MR. GORDON: Yes, and I admit the sympathies are certainly not on my client's side. The Third Circuit has in the Taylor case and the Supreme Court have pointed out these bright line deadlines have to be followed. And the Third Circuit in the Taylor case which I mentioned says that sometimes enforcing

* * *

[9] advised that there was a late February deadline. I do not know for an absolute fact that he knew the deadline was on that particular date.

Everything that had to be done, short of my office personally delivering it to the courthouse itself, was in fact done, and had it not been for the fact that the secretary going into the book, and very likely the Lawyers Diary, and finding the address of — former address of the courthouse — and it was addressed correctly from the standpoint it was the correct address of the Court's prior location — that is the only thing that happened within the set of facts that went wrong in terms of the actual filing on that particular date.

Judge Tuohey also said that separate and apart from that, separate and apart from the fact that we are not talking about a package that was sent a day late or sent a week late or sent two weeks later, but actually sent the day before, overnight, and arrived on location on the correct day, although across the street —

THE COURT: This would be good cause. But good cause is not an excuse.

MR. MARKWARDT: It would be good cause. It would be excusable neglect when it is taken into consideration with the other factors he found.

THE COURT: If good cause were a basis to extend the time limits.

[10] MR. MARKWARDT: That's why I say — I started out saying that Mr. Gordon gets up and he's beginning to dispute

findings of fact. The findings of fact that Judge Tuohey made are not really disputable here. Those are the circumstances concerning the actual addressing and the delivery of the package itself.

You have the fact that Mr. Gordon himself as debtor's counsel was advised — and that's not in disputed — was advised the complaint was going to be filed in a conversation with my partner.

THE COURT: All the equities are in your favor, but I don't know that the law is.

MR. MARKWARDT: Getting to the law, we get to the fact that — and this is why there is a recitation of what happened below. The bankruptcy rules, they are certainly not meant to be read with computerese. It is not supposed to be read in a situation in which, in order to enforce them, it's going to produce an unjust, inequitable result.

You have a situation here in which the complaint that is in question has to do with assertions of fraud, assertions of serious fraud that have been in existence, known by the debtor, and known by debtor's counsel, various counsel for the debtor for years at this time, known so much so that Mr. Gordon, as debtor's counsel, filed a petition to remove those state cases to the federal court a month before the deadline.

* * *

[12] minutes from the time without contest it could have been filed to the time that it was filed.

Was it beyond the control of the parties? Again, given the fact that the address was taken probably from the Lawyers Diary and the fact that a recognized, commercially accepted messenger service was used and did not call the office to say that there was any problem, I believe that was reasonably beyond the control.

The question of the creditor's good faith, there is nothing here that puts into question the good faith of the creditor, and I think that Judge Tuohey also made as a finding of fact, which Mr. Gordon wants to raise questions about it, but there is no doubt that the matrix address supplied by the Court was an incorrect address, it could have been supplied, that the notices could have been going directly to the client so that there could not have been any question whatsoever about that, I think that when Judge Tuohey took into consideration all these circumstances, and the fact that in the past, where there have been what otherwise appeared to be drop dead deadlines, they have been extended by the Court. They have been extended even where the deadlines are in statutes, not in a rule.

THE COURT: I will do my best to find in your favor, but I am faced with a statute.

MR. GORDON: When Judge Tuohey mentioned the Lawyers Diary, he mentioned a 1993 Lawyers Diary, and in fact the 1993 [13] Lawyers Diary that Judge Tuohey brought out to the bench said the old Rodino Federal Building address.

The complaint in this case was due in February of 1994, and if they used the Lawyers Diary, it's common knowledge these Lawyers Diaries come out before the end of the prior year, if they used the 1994 diary, which I have in my hand, they would see that the 1994 Lawyers Diary, page 45, says, "William F. Tuohey,

MLK Junior Federal Building and Courthouse, 50 Walnut Street, Third Floor." If they used the current year's Lawyers Diary they would have gotten the correct address.

THE COURT: The lawyer keeps the current year and he gives the secretary the year before.

MR. GORDON: That may be, but it's the lawyers responsibility to know where the courthouse is.

THE COURT: Well, I would love to decide against you if I possibly could.

MR. GORDON: I understand.

THE COURT: I'm going to look for a way, but I don't know — you may be right.

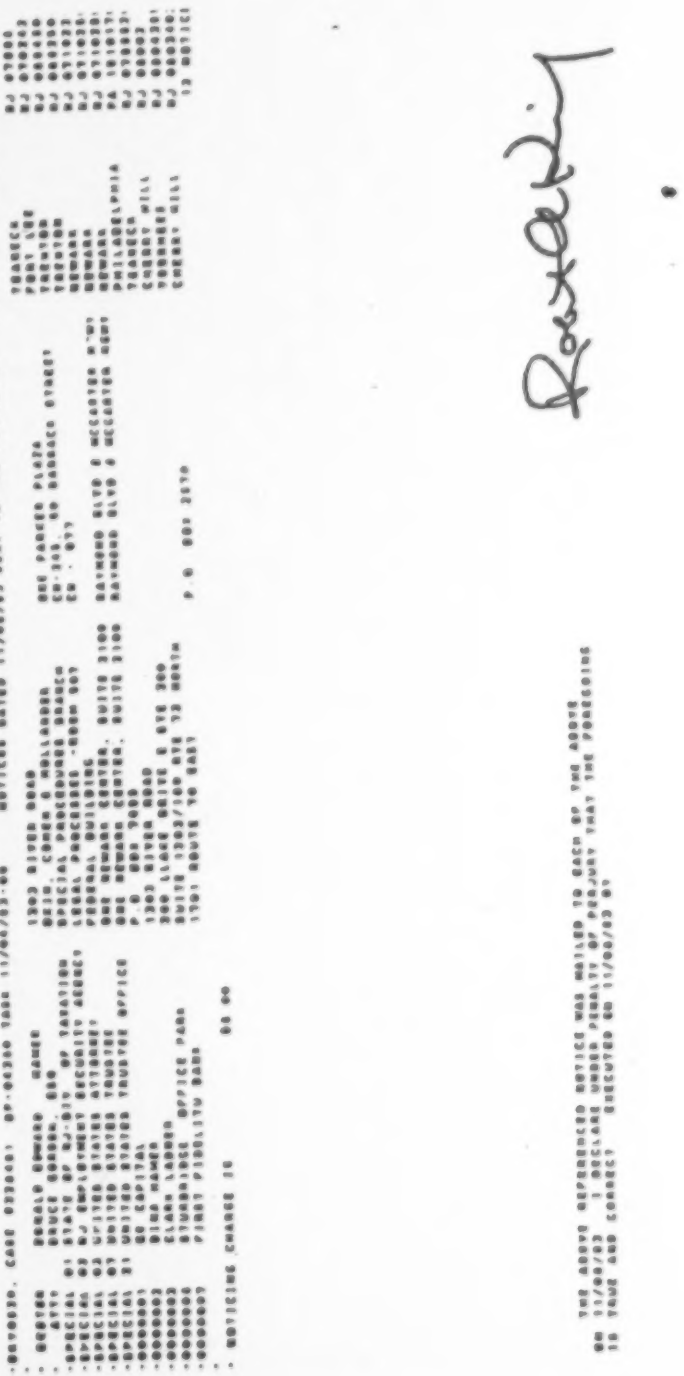
MR. GORDON: The equities are certainly not in my favor, but the law is.

THE COURT: Yes, that's correct.

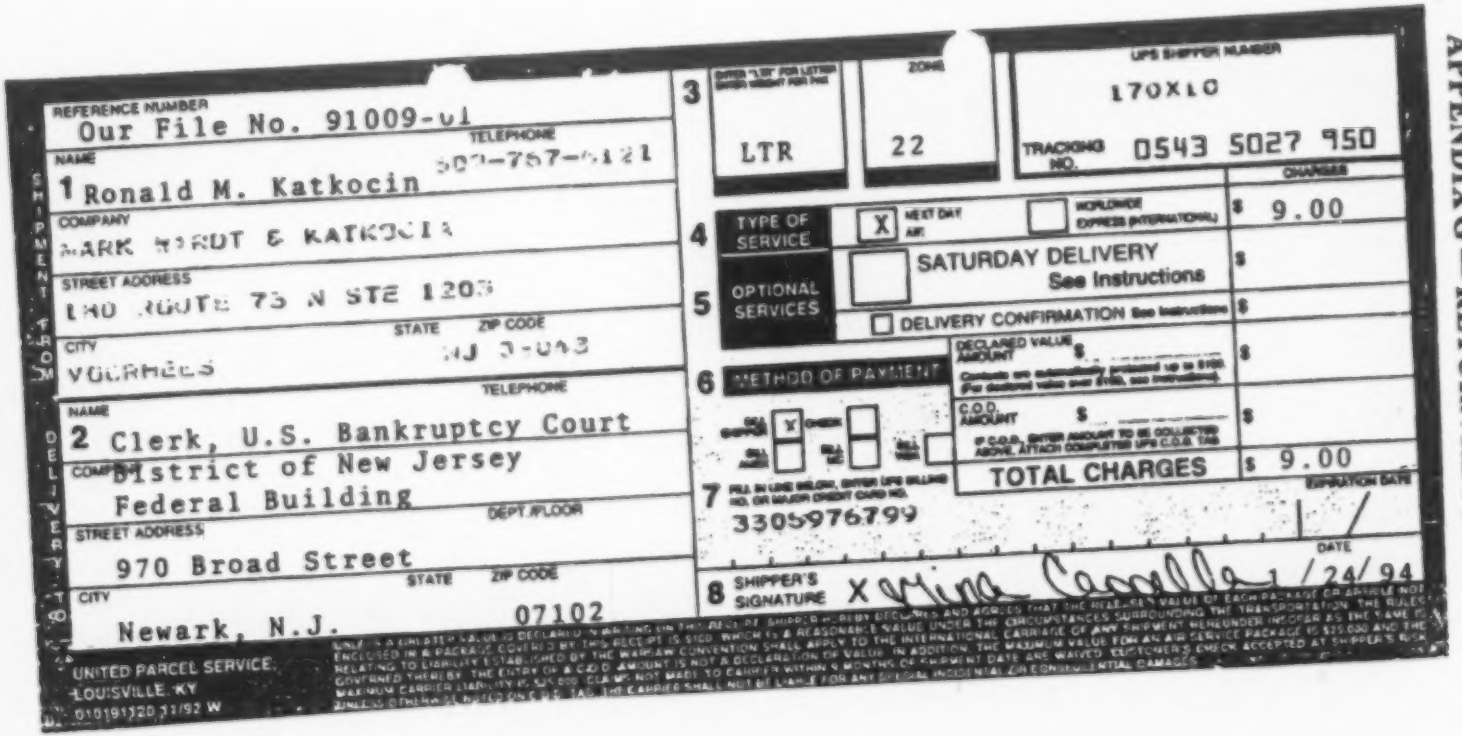
All right. Thank you very much.

BEST AVAIL

APPENDIX F — NOTICES DATED NOVEMBER 8, 1993



Appendix F



SHIPMENT FROM

REFERENCE NUMBER: Our File No. 91009-01

1 NAME: Ronald M. Katkocin — TELEPHONE: 201-757-6121

COMPANY: MARK MINUT & KATKOCIN

STREET ADDRESS: 140 ROUTE 73 N STE 120B

CITY: VOORHEES — STATE: NJ — ZIP CODE: 08043

DELIVER TO

2 NAME: Clerk, U.S. Bankruptcy Court — TELEPHONE:

COMPANY: District of New Jersey
Federal Building

STREET ADDRESS: 970 Broad Street — DEPT./FLOOR:

CITY: Newark, N.J. — STATE: — ZIP CODE: 07102

3 LTR — ZONE: 22 — UPS SHIPPER NUMBER: 170X10 — TRACKING NO.: 0543 5027 950

4 TYPE OF SERVICE: [X] NEXT DAY AIR — [ ] WORLDWIDE EXPRESS (INTERNATIONAL) — $ 9.00

5 OPTIONAL SERVICES: [ ] SATURDAY DELIVERY See Instructions — $; [ ] DELIVERY CONFIRMATION See Instructions — $

6 METHOD OF PAYMENT: [ ] BILL SENDER [X] CHECK [ ] BILL THIRD PARTY [ ] BILL TO INTERNATIONAL — DECLARED VALUE AMOUNT $ — $; C.O.D. AMOUNT $ — $; TOTAL CHARGES $ 9.00

7 FILL IN LINE BELOW, ENTER UPS BILLING NO. OR MAJOR CREDIT CARD NO.: 3305976799 — EXPIRATION DATE

8 SHIPPER'S SIGNATURE: X [signature] — DATE: 1/24/94

UNITED PARCEL SERVICE, LOUISVILLE, KY — 010191320 11/92 W

UNLESS A LIMITED VALUE IS DECLARED, WARNING ON THIS RECEIPT SHIPPER HEREBY DECLARES AND AGREES THAT THE REMEDY VALUE OF EACH PACKAGE OR ARTICLE NOT ENCLOSED IN A PACKAGE COVERED BY THIS RECEIPT IS $100, WHICH IS A REASONABLE VALUE UNDER THE CIRCUMSTANCES SURROUNDING THE TRANSPORTATION. THE RULES RELATING TO LIABILITY ESTABLISHED BY THE WARSAW CONVENTION SHALL APPLY TO THE INTERNATIONAL CARRIAGE OF ANY SHIPMENT HEREUNDER INSOFAR AS THE SAME IS GOVERNED THEREBY. THE ENTRY OF A C.O.D. AMOUNT IS NOT A DECLARATION OF VALUE. IN ADDITION, THE MAXIMUM VALUE FOR AN AIR SERVICE PACKAGE IS $25,000 AND THE MAXIMUM CARRIER LIABILITY IS $25,000. CLAIMS NOT MADE TO CARRIER WITHIN 9 MONTHS OF SHIPMENT DATE ARE WAIVED. CUSTOMER'S CHECK ACCEPTED AT SHIPPER'S RISK. UNLESS OTHERWISE AGREED IN WRITING, THE CARRIER SHALL NOT BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES.

(2)

Supreme Court, U.S.
FILED
JUL 31 1996
CLERK

No. 95-2093

In The

Supreme Court of the United States

October Term, 1995

In Re:

DONALD EDWARD HAMER,

Debtor.

BERDJ MOVSESIAN; ADRIENNE MOVSESIAN; NOUBAR MAHDESSIAN; ANN MAHDESSIAN; A&N, INC.; and BERDJ & NOUBAR CORP.;

Petitioners,

vs.

DONALD E. HAMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

The Respondent asks leave to file the attached Brief in Opposition to Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

The Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

The Respondent's affidavit in support of this motion is attached hereto.

OKIN, COHEN & HOLLANDER
Attorneys for Respondent
One Parker Plaza
Fort Lee, New Jersey 07024
(201) 947-7500

Bruce D. Gordon
Counsel of Record

4 pp

STATE OF NEW YORK }
} S.S:
COUNTY OF ULSTER }

I, Donald Edward Hamer being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issue which I desire to respond to with regard to a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit is the following:

> Whether a bankruptcy court can allow a plaintiff to file a complaint to determine dischargeablity late if the late filing was the result of excusable neglect.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

No. I am not presently employed. My last employment ended on September 15, 1993. Such prior employment was on a project/consultant basis. The average monthly wages for this position were $8,500. I am presently receiving monthly Social Security disability benefits in the sum of $1,203 which is net of monthly deduction of Medicare medical insurance premium of $43.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

No.

3. Do you own any cash or checking or savings account?
   a. If the answer is yes, state the total value of the items owned.

Yes. The total amount in account is $75.97 as of June 30, 1996.

4. Do you own any real estate, stocks, bonds notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   a. If the answer is yes, describe the property and state its approximate value.

Yes. I own a 1/3 interest with my wife and daughter in a two family house located at 889 Red Road, Teaneck, New Jersey (the "Property"). The Property is listed on my bankruptcy schedules as having a value of $90,000. The Property is subject to claims of creditors, including secured creditors in my bankruptcy proceeding. It is doubtful that I have any equity in the Property.

I do not own any other valuable property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I declare under the penalty of perjury that the foregoing is true and correct.

Donald E. Hamer

SUBSCRIBED AND
SWORN TO before me
this 31st day of July, 1996.

JEANNINE MAYER [redacted]
Notary Public, State of New York
Resident in and for Ulster County
Commission Expires January 12, 1997

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

No. 95-2093

In The

Supreme Court of the United States

October Term, 1995

In Re:

DONALD EDWARD HAMER,

Debtor.

BERDJ MOVSESIAN; ADRIENNE MOVSESIAN; NOUBAR MAHDESSIAN; ANN MAHDESSIAN; A&N, INC.; and BERDJ & NOUBAR CORP.;

Petitioners,

vs.

DONALD E. HAMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Where a creditor has received actual notice of the bar date to file complaints to determine dischargeability of a debt, is the bankruptcy court empowered with the discretion to allow the creditor to file a complaint in an untimely manner based upon the existence of excusable neglect?

STATUTES AND RULES

11 U.S.C. §523

§523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

* * *

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

* * *

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15) as the case may be, of subsection (a) of this section.

Fed. R. Bankr. P. 4007
DETERMINATION OF DISCHARGEABILITY OF A DEBT

* * *

(c) *Time for Filing Complaint Under §523(c) in Chapter 7 Liquidation, Chapter 11 Reorganization, and Chapter 12 Family Farmer's Debt Adjustment Cases; Notice of Time Fixed.* A complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Fed. R. Bankr. P. 9006
TIME

* * *

(b) *Enlargement.*

(1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

* * *

(3) *Enlargement Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

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STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1254(1) because the critical questions presented for review in the Petition for Writ of Certiorari (the "Petition") were never presented to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). These newly presented arguments may not be properly considered. *See* p. 5 below.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The underlying action is an adversary proceeding brought within a bankruptcy case. It is a core proceeding as defined in 28 U.S.C. §157(b)(2)(I) because it directly relates to the time within which to file a complaint objecting to dischargeability of debts.

This case was commenced by Berdj Movsesian, Adrienne Movsesian, Noubar Mahdessian, Ann Mahdessian, Berdj & Noubar Corporation, and A&N, Inc., Petitioners herein ("Petitioners") filing a Complaint to determine the dischargeability of a debt due (the "Complaint") from Donald E. Hamer, Respondent herein ("Respondent"), Op. at 2a[1], on February 28, 1994, one business day after the deadline to do so (the "Adversary Proceeding") which was February 25, 1994 (the "Bar Date"). On March 29, 1994, Respondent filed a motion to dismiss the Adversary Proceeding because the Complaint was filed after the Bar Date (the "Dismissal Motion"). *Id.* On September 8, 1994 a hearing was held before the Honorable William F. Tuohey, U.S.B.J. with respect to the Dismissal Motion. At the hearing on September 8, 1994, the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") heard oral argument with respect to the Dismissal Motion and thereafter entered its opinion on the record denying the Dismissal Motion. *Id.* at 3a. Subsequently, on September 29, 1994, the Bankruptcy Court entered an Omnibus Order With Respect to the Hearing of September 8, 1994 (the "Omnibus Order") which provided for denial of the Dismissal Motion. *Id.* at 3a; *See* Petition at 18a,

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[1]For convenience, all citations to the opinion of the District Court dated April 10, 1995 and filed on April 13, 1995 (the "District Court Opinion") will be to the opinion attached hereto as Appendix A and cited to as "Op."

23a-24a.

Upon uncovering matters and controlling decisions which counsel for Respondent believed constituted cause for reconsideration of the Bankruptcy Court's decision denying the Dismissal Motion, Respondent filed a motion for reconsideration (the "Reconsideration Motion") on September 26, 1994. Op. at 3a. At the hearing on the Reconsideration Motion on November 1, 1994 the Bankruptcy Court heard oral argument and thereafter entered its opinion on the record denying the Reconsideration Motion. *Id.* Subsequently, on September 29, 1994, the Bankruptcy Court entered an Order Denying Motion for Reconsideration (the "Order Denying Motion for Reconsideration"). *Id.*; *See* Petition at 16a-17a. Respondent appealed to the United States District Court for the District of New Jersey (the "District Court") from paragraph 2 of the Omnibus Order and from the Order Denying Motion for Reconsideration.

Thereafter, on April 10, 1995, oral argument with respect to the appeal filed by Respondent was heard by the Honorable Dickinson R. Debevoise, S.U.S.D.J. On April 10, 1995, the District Court reversed the Bankruptcy Court and entered an order remanding the matter to the Bankruptcy Court for dismissal of the Complaint. *See* Petition at 15a. On May 11, 1995, the Petitioner filed a Notice of Appeal to the Third Circuit. By Judgment Order dated March 12, 1996, the Third Circuit affirmed the order of the District Court without opinion. *See Id.* at 1a-3a.

B. Corrections of Misstatements in the Petition

The District Court Opinion correctly sets forth only the relevant facts in this case. In the interest of brevity, Respondent respectfully directs the Court to the District Court Opinion, attached as Appendix A, for a statement of facts.

Pursuant to United States Supreme Court Rule 15.2, Respondent hereby addresses misstatements of fact contained in the Petition. Preliminarily, Respondent objects to the insertion in the Petition of the long recitation of allegations incorrectly presented as fact in Petitioners' Statement of the Case regarding

the alleged fraud of Respondent, which are irrelevant to the granting of the Petition and are only presented as an attempt to inflame the Court. Also, Petitioners mislead the Court by stating that "the District Court did not disturb any of the factual determinations of the Bankruptcy Court since they were to be given conclusive effect unless they were found to be 'clearly erroneous'." *Id.* at 5. The District Court never adopted the factual determinations of the Bankruptcy Court. Rather, the District Court specifically noted that "[a]lthough the bankruptcy court made factual findings, the dispositive issue involves a legal determination, namely, whether a bankruptcy judge can extend the time for filing a complaint to determine dischargeability under Bankruptcy Rule 4007(c) for excusable neglect absent a motion to extend the time made before its expiration." Op. at 4a.

Petitioners statement that as a result of Respondent's own preparation of an improper matrix, Petitioners had *no notice* of the Bar Date is a misstatement of fact. Petition at 11. The Bankruptcy Court never made a finding that Petitioners lacked notice of the Bar Date. The Bankruptcy Court merely stated that its review of the Clerk's certification of mailing revealed that Petitioners did not receive the §341 notice from the Clerk. *See Id.* at 31a. To the contrary, the District Court, citing the Bankruptcy Court, specifically states that the Bankruptcy Court found that Petitioners attended the meeting of creditors and thus had *actual notice* of the Bar Date which would vitiate their ability to file out of time. Op. at 8a.

Petitioners also state to the Court that they had sent the Complaint for filing in a timely manner and with a recognized delivery agent. Petition at 11. Petitioners fail to point out that the Bankruptcy Court noted that although that was true, the envelope was not properly addressed, and thus undeliverable. *Id.* at 32a-33a.

Petitioners also mischaracterize the facts by their citation to three reasons for the untimely filing of the Complaint. Petition at 11. The reasons alleged are: (i) that the Bankruptcy Court had moved locations; (ii) that the envelope had been inadvertently addressed; and (iii) that the address set forth in the New Jersey Lawyers Diary listed the prior address of the Bankruptcy Court. *Id.* In making these

statements to the Court, Petitioners have failed to disclose that: (i) the Bankruptcy Court duly noted that the Bankruptcy Court had moved in late 1992, Tr. at 10a[2], some fourteen months prior to the Bar Date; (ii) that there is nothing in the record before the Bankruptcy Court that indicated that Petitioners' counsel did not know the proper address of the Bankruptcy Court; and (iii) that it was the 1993 New Jersey Lawyers Diary and Manual which still listed the previous address of the Bankruptcy Court[3], not the 1994 New Jersey Lawyers Diary and Manual which had the proper address of the Bankruptcy Court at the time the Complaint was to be filed.

Petitioners continually misstate the facts concerning whether they or their counsel ever received notice of the Bar Date to file the Complaint.[4] Petition at 3-4, 8, 11. Petitioners neglect to state that the Bankruptcy Court found that the Notice to Creditors, albeit without the name of the Petitioner's attorney or his law firm, was sent to "Sturbridge Office Park, Suite 1203", the office of Petitioners' attorney. Tr. at 11a-12a. The Bankruptcy Court also found that Petitioners had actual notice of the Bar Date. *Id.* at 12a-13a. The Bankruptcy Court found that Petitioners' counsel attended the first meeting of creditors under §341 of the Bankruptcy Code. *Id.* at 14a. Quite significantly, Petitioners' counsel attempted,

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[2]Respondent has annexed hereto excerpts from the transcript of the hearing before the Bankruptcy Court on the Reconsideration Motion held on November 1, 1994. References to the transcript pages attached hereto will be cited as "Tr." Rather than duplicate the efforts of Petitioners with regard to the other relevant Transcript excerpts, Respondent will refer to the pages of the Appendix annexed to the Petition where appropriate.

[3]At the hearing on the Reconsideration Motion, the Bankruptcy Court held that it was not making a finding on this fact, Tr. at 11a, but the Bankruptcy Court took judicial notice of such, *Id.*, and again later relies on such in its decision. *Id.* at 13a. Whether same can be classified as a "finding" by the Bankruptcy Court as Petitioners contend is unclear. Petitioners certainly had a duty to disclose that the Bankruptcy Court specifically noted it was not making a "finding" based upon this.

[4]According to the Notice of Commencement of Case Under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"), Meeting of Creditors, and Fixing of Dates (the "Notice to Creditors") which was sent out by the Clerk of the Bankruptcy Court, the first meeting of creditors was scheduled for December 27, 1993 and the "deadline to file a complaint to determine dischargeability of certain debts" was set as "February 25, 1994."

albeit unsuccessfully, to comply with the February 25, 1994 Bar Date[5]. Petition at 32a.

Finally, Petitioners suggest that some "negligence or misconduct of the debtor" *caused* the late filing of the Complaint; this was never a finding of the Bankruptcy Court and was not an issue which was raised below.

REASONS FOR DENYING THE PETITION

I

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' CLAIM THAT THEY HAVE BEEN DEPRIVED OF IMPORTANT PROPERTY RIGHTS AND WERE DENIED DUE PROCESS OF LAW

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*); *see also Tennessee v. Dunlap*, 426 U.S. 312 (1976) (Court refuses to review claims on certiorari on appeal which were not raised or addressed by the district court or court of appeals below). "The Court decides which questions to consider through well established procedures; allowing the able counsel who argue before us to . . . devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

For the first time, Petitioners argue before this Court that the District Court's application of the law has deprived them of important property rights and denied them due process of law. Petition at 8, 16. Petitioners never raised these arguments before the Bankruptcy Court, the District Court or the Third Circuit. There are no "unusual circumstances" cited by Petitioners that warrant addressing their arguments regarding forfeiture and denial of due process at this time. *See Taylor*, 503 U.S. at 646.

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[5]In light of the fact that Petitioners' counsel attempted to comply with the Bar Date by mailing by UPS the Complaint on February 24 (one day prior to the Bar Date), it seems disingenuous for Petitioners to state they never knew of the Bar Date. Petitioners never stated why they sent it on precisely that date.

II

EVEN IF THE COURT CONSIDERS PETITIONERS' CLAIM, THE HOLDING BELOW DID NOT DEPRIVE PETITIONERS OF IMPORTANT PROPERTY RIGHTS OR DENY PETITIONERS DUE PROCESS OF LAW

A. The Bankruptcy Code and Rules Provide Adequate Time for Notice and the Opportunity to be Heard

It is well established that the procedural due process protections of the Fifth and Fourteenth Amendments include the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) and cases cited therein; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process demands that the required notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). This Court has frequently recognized that due process is a variable concept which depends on the particular subject matter and circumstances of each given case. *See, e.g. Betts v. Brady*, 316 U.S. 455 (1942); *Moyer v. Peabody*, 212 U.S. 78 (1909). "[D]ue process of law has never been a term of fixed and invariable content." *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 264, 275 (1949).

The Federal Rules of Bankruptcy Procedure set forth the procedures relating to notice and time for filing objections to a debtor's discharge or to the dischargeability of a debt. Rule 4007(c) provides the general notice requirements and time frame that must be satisfied to discharge a debt under §523(c) of the Bankruptcy Code. Fed. R. Bankr. P. 4007(c). More specifically, Rule 4007(c) provides that a complaint to determine the dischargeability of any debt pursuant to §523(c) cannot be filed later than 60 days after the "first date set for the meeting of creditors held pursuant to §341(a)." *Id.*; *Dollinger v. Poskanzer (In re Poskanzer)*, 146 B.R. 125 (D.N.J. 1992). Furthermore, Rule 4007(c) also provides a creditor an opportunity to request an extension of the deadline. Fed. R. Bankr. P. 4007(c). However,

any request for an extension must be filed before the time for objection has expired. *Id.*[6]

A clear and unambiguous reading of Rule 9006(b)(3) also indicates that the bankruptcy court may only enlarge the time to file a complaint under Rule 4007(c), if the request is made under the conditions set forth in Rule 4007(c), which is before the deadline to file a complaint has expired. *See* Fed R. Bankr. P. 4007(c). From a literal reading of Rules 4007(c) and 9006(b)(3) there is no discretion for the court to extend the time to file a dischargeability complaint once the time to do so has expired. "[Rule] 9006 . . . provides no assistance to a party that has missed the deadline contained in [Rule] 4007." *Biederman v. Oury, DeClemente & Mizdol v. Chester & Biederman (In re Biederman)*, 165 B.R. 783, 788 (Bankr. D.N.J. 1994). The excusable neglect standard contained in Rule 9006(b)(1) does not apply in Rule 4007(c) situations. *Id.* "While Rule 9006(b)(1) does provide that enlargement of a time period may be sought on the basis that a failure to timely act was attributable to excusable neglect, it cannot be utilized to extend the [deadline] contained in [Federal Rule of Bankruptcy Procedure] . . . 4007." *Id.* "Rule 9006(b)(1) and Rule 9006(b)(3) are plainly intended to be mutually exclusive." *In re Klein*, 64 B.R. 372, 374 (Bankr. E.D.N.Y. 1986) (quoting *Vacariello v. Lagrotteria*, 43 B.R. 1007, 1013 (D.N.D. Ill. 1984)). As the advisory committee's note states, in discussing subdivision (b) of Rule 9006,

> Unless a rule which contains a specific authorization to extend time is listed in paragraph (3) of this subdivision, an extension of time may be granted under paragraph (1) of this subdivision. *If a rule is included in paragraph (3) an extension may not be granted under paragraph (1).*

Fed. R. Bankr. P. 9006(b) advisory committee's note (emphasis added).

The District Court correctly noted the only situation where a litigant would be denied due process, stating:

> Allowing a creditor without notice to file past the deadline is not a back door way of permitting excusable neglect, however. A creditor without notice of the deadline has not even had the opportunity to commit neglect, and it would be unfair (*and a violation of*

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[6]Rule 4007(c) provides: "[T]he motion *shall* be made before the time has expired." (emphasis added).

> *due process*) to bar that creditor from bringing a claim without notification of the deadline to file a Complaint.

Op. at 8a (emphasis added).

As was recognized by the District Court, the discretion to extend the time to file a complaint under Fed. R. Bankr. P. 4007(c) after the deadline has passed is limited. *Id.* (citing *Poskanzer*). Under §523(a)(3)(B) of the Bankruptcy Code only those creditors who lack notice *or* actual knowledge of the case are permitted a late filing of their complaint to the dischargeability of a debt. *Id.* (citing *Poskanzer* at 127-28). (emphasis added). "A plain-reading of the Code and the Bankruptcy Rules suggests that a creditor's possession of actual knowledge of the case vitiates an inadequately noticed creditor's ability to file out of time." *Id.* (quoting *Poskanzer* at 128).

As the District Court stated, "the plaintiffs obviously had actual notice of the deadline for the filing of their Complaint against the defendant because their attorney attended the December 27, 1993 creditors' meeting. In light of the fact that the plaintiffs had actual notice of the February 25, 1994 filing deadline, plaintiffs cannot file late." Op. at 8a.

Accordingly, the holding of the Third Circuit affirming the District Court does not require a bankruptcy court to be "blind" to negligence or misconduct of a debtor in not providing notice to a creditor of filing, as Petitioners suggest. Petition at 9-10. If a debtor fails to list a creditor, and that creditor does not have actual notice, the Court can permit the untimely filing of a dischargeability complaint under 11 U.S.C. §523(a)(3)(B). Since it was found that Petitioners had actual notice of the Bar Date, Petitioners were required to *file* their complaint in a timely manner[7]. As the Bankruptcy

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[7]Commencement of an adversary proceeding is governed by Fed. R. Bankr. P. 7003, which makes Fed. R. Civ. P. 3 applicable to adversary proceedings. Fed. R. Civ. P. 3 provides: "A civil action is commenced by *filing* a complaint with the court." (emphasis added).

The Rule does not state that mailing the complaint completes commencement. The complainant must file the complaint within the applicable periods to properly commence the adversary proceeding. *See In re Jeffrey*, 169 B.R. 25, 27 (Bankr. D. Md. 1994) ("The mere mailing of a pleading within a required filing period is insufficient to constitute a filing within that time period").

Appellate Panel of the Ninth Circuit held: "There is no deprivation of Due Process since [the creditor] had actual notice of the Chapter 7 case and had sufficient time to file a complaint to determine dischargeability of a debt under §523(a)." *Herndon v. De La Cruz (In re De La Cruz)*, 176 B.R. 19, 23-24 (Bankr. 9th Cir. 1994).

Petitioners also argue that the fact that they advised Respondent's counsel by phone of the intended filing of the Complaint should excuse the late filing. This was not a finding of the Bankruptcy Court nor addressed by the District Court. Nowhere in the Federal Rules of Bankruptcy Procedure, nor in any case cited by Petitioners, does it indicate counsel's knowledge of a creditor's intention to file a dischargeability complaint will serve as a substitute for timely filing of a complaint. *See Classic Auto Refinishing, Inc. v. Marino (In re Marino)*, 37 F.3d 1354, 1357 (9th Cir. 1994).

Petitioners next argue that Respondent's removal of the state court action to the Bankruptcy Court "constituted compliance with the requirement that a Complaint to Determine Dischargeability be filed." Petition at 10. Petitioners cite the case of *Williams v. Gurley (In re Williams)*, 3 B.R. 401 (Bankr. N.D. Ga. 1980). However, nowhere in *Williams* does the court conclude that the removal to a bankruptcy court of a pending state court action constitutes compliance with the requirement that a complaint to determine dischargeability be filed. *Williams* stands only for the proposition that, with respect to a 11 U.S.C. §523(a)(5) exception to discharge, bankruptcy law, not state law, determines whether an obligation in question is in the nature of alimony, maintenance, or support. *Williams*, 3 B.R. at 403. The only discussion of removal to a bankruptcy court by the *Williams* court, was its notation as to the availability of the removal process under 28 U.S.C. §1478(a). *Id.*

Finally, Petitioners citation of *Legacy, Ltd. v. Channel Home Centers, Inc. (In re Channel Home Centers, Inc.)*, 989 F.2d 682 (3rd Cir. 1993) is misplaced and is not a basis for this Court to grant the Petition. Petitioners cite *Channel* for the proposition that "even unambiguous statutory language need

not be followed in those 'rare cases [in which] the literal application of a statute[8] will produce a result demonstrably at odds with the intentions of its drafters.'". *Id.* at 687. However, this does not give the court license to disregard clear language merely because Petitioners claim equity is on their side. *See Norfolk & Western Ry. Co. v. American Train Dispatchers Assn.*, 499 U.S. 117, 128 (1991). Regardless, *Channel* is clearly distinguishable as it dealt with the assumption or rejection of a commercial lease under §365(d)(4)[9], not the time period to file a dischargeability complaint.

Furthermore, Petitioners fail to state how this case would produce a result "demonstrably at odds" with the intention of Congress. In fact, the promulgation of the current Federal Rules of Bankruptcy Procedure pursuant to 28 U.S.C. §2075 foreclosed a creditors right to file such complaints. Under the former rules, the court was empowered with discretion to allow an untimely complaint. *See* Op. at 6a (citing former Bankruptcy Rule 906(b)). The promulgation of Rule 9006(b)(3), after careful consideration, specifically stripped the bankruptcy court of any discretion when a dischargeability complaint was not timely filed. Rule 9006(b)(3) marks a change from the practice under the former bankruptcy rules, which permitted a court to allow a late filed discharge or dischargeability complaint upon a showing of excusable neglect. *See Manufacturers Hanover Trust Co. v. Horvath (In re Horvath)*, 20 B.R. 962 (Bankr. S.D.N.Y. 1982). "It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable

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[8]Petitioners assert that the federal question here is governed, not by a statute, but by a "mere" Rule of Procedure. Petition at 11. While it is true that the Federal Rules of Bankruptcy Procedure do govern here, Petitioners assertion of the apparent proposition that a court may apply the Federal Rules of Bankruptcy Procedure thoughtlessly, or that a court is permitted to disregard rules promulgated by this Court more so than it would be permitted to disregard a "statute" is simply untrue and unfounded.

[9]11 U.S.C. §365(d)(4) provides in pertinent part:

> [I]f the Trustee does assume or reject an unexpired lease of nonresidential real property under which the debtor is a lessee within 60 days after the date for the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected....

neglect in failing to timely object to discharge of a claim." *In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983). If anything, to hold that the court has discretion would be "demonstrably at odds" with the intention of Congress.

B. Bankruptcy Code §105 Provides No Relief to Petitioners

Petitioners ask that the Petition be granted because the application of Rule 4007(c) and Rule 9006(b)(3) deprives a bankruptcy court of its equitable powers under §105 of the Bankruptcy Code. (Petition at 10). This Court has held to the contrary. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). "A bankruptcy court does not have unfettered equity powers." *Wasserman v. Immormino (In re Granger Garage, Inc.)*, 921 F.2d 74, 77 (6th Cir. 1990) (citing *Ahlers*, 485 U.S. 197). "Equity aids the vigilant, not those who slumber on their rights." 3 *Pomeroy's Equity Jurisprudence* §§ 418, 419 at 169-71 (S. Symons 5th ed. 1941) (cited in *Jones v. U.S. Dep't of Treasury, I.R.S. (In re Jones)*, 129 B.R. 1003, 1011 (Bankr. N.D. Ill. 1991)); *see also Baker v. Cummings*, 169 U.S. 189 (1898) ("[E]quitable powers will not be exercised to discover whether one has been wronged, when, with full knowledge of the alleged wrong, he has . . . slept upon his rights until such situation has arisen as to render it inequitable to afford him relief."); *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994) ("bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language.") (quoting *Childress v. Middleton Arms, L.P. (In re Middleton Arms, Ltd. Partnership)*, 934 F.2d 723, 725 (6th Cir. 1991)); *In re Morristown & Erie R.R.*, 885 F.2d 98, 100 (3d Cir. 1989) ("Section 105 gives the court general equitable powers, but only insofar as those powers are applied in a manner consistent with the Code. Nor does section 105(a) give the court the power to create substantive rights that would otherwise be unavailable under the Code." (citations omitted)).

It is axiomatic that bankruptcy courts must adhere to the clear intent of Congress. When statutory

language is clear and unambiguous it must be followed. *Rake v. Wade*, 508 U.S. 464, 471 (1993); *Patterson v. Shumate*, 504 U.S. 753, 757 (1992); *Prisco v. Talty*, 993 F.2d 21, 24 (3d Cir. 1993). "[The] Court is bound to apply the plain meaning of the statute even when the application apparently results in an apparent anomaly." *Michel v. Eagle-Picher Industries, Inc. (In re Eagle-Picher Industries, Inc.)*, 999 F.2d 969, 972 (6th Cir. 1993).

"The Fed. R. Bankr. P. are to be liberally construed 'to secure the just . . . determination of every case and proceeding.' Fed. R. Bankr. P. 1001. However, the spirit of liberal construction does not allow the court to ignore procedural rules altogether." *In re Gray*, 156 B.R. 707, 711 n.10 (Bankr. D. Me. 1993); *see also* 4 Charles A. Wright and Arthur B. Miller, *Fed. Prac. & Proc.*, §1029 n.12 (collecting cases). "To the extent consistent with due process, the bankruptcy court's powers are . . . constrained by the Fed. R. of [sic] Bankr. P." *Gray* 156 B.R. at 709 (citing *Taylor v. Freeland & Kronz*, 112 S. Ct. at 1649 (503 U.S. at 645)).

In support of the Petition, Petitioners only cite cases which underlie the basic premise of §105, all of which are factually distinguishable. They are, in effect, the *Pepper v. Litton*, 308 U.S. 295 (1939) progeny. However, as pointed out, §105 has limits. Petitioners have failed to cite even a single case in which §105 was used by a court to allow a late filing of a complaint in the same context as faced by Petitioners.

Petitioners also contend that bankruptcy courts have not been deprived of equitable powers in similar circumstances. Petition at 13. In support of this contention, Petitioners assert that discretion to extend the deadline to object to exemptions under circumstances of excusable neglect exists under Rule 4003 and similarly should exist under Rule 4007(c). This Court has held to the contrary in *Taylor*, 503 U.S. 638, where it denied the application of the excusable neglect standard under Rule 4003(b). Shamefully, Petitioners ignore *Taylor* and intentionally cite three cases that do not apply to Rule 4003(b), although Petitioners assert that they do. Those cases are *Martine v. Cipa (Matter of Cipa)*, 11 B.R. 968

(Bankr. W.D. Pa. 1981); *Ragsdale v. Genesco, Inc.*, 674 F.2d 277 (4th Cir. 1982); and, *Lipshie v. Bartley (In re Bartley)*, 33 B.R. 768 (Bankr. E.D.N.Y. 1983)[10]. This misleading argument was raised by Petitioners in the District Court[11] citing precisely the same cases. The District Court rejected this argument, noting:

> Petitioners do cite to a number of cases which allow late filings of objections to exemptions upon the demonstration of inequities. *See* Petitioners' Brief at 14 (citing *Matter of Cipa*, 11 B.R. 968, 970 (Bankr. W.D. Pa. 1981); *Ragsdayle* [sic] *v. Genesco, Inc.*, 674 F.2d 277, 278 (4th Cir. 1982); *In re Bartley*, 33 B.R. 768, 770 (Bankr. E.D.N.Y. 1983)). The plaintiffs' argument by analogy to the filing of a Complaint is not necessarily a bad one. However, the plaintiffs' citation to law prior to the adoption of the current Bankruptcy Rules is problematic because Congress has done away with the excusable neglect standard in the context of the filing of objections as well. *See* Bankruptcy Rule 4003.

Op. at 6a, n.2.

III

THE SUPREME COURT HAS ALREADY RULED IN A SIMILAR CONTEXT THAT DEADLINES IN THE FEDERAL RULES OF BANKRUPTCY PROCEDURE ARE TO BE CONSTRUED STRICTLY

In a case addressing a rule with similar application to that in the case at bar, this Court has made it clear that certain deadlines in bankruptcy rules mean what they say and that violations of such deadlines cannot be ignored or excused. *Taylor*, 503 U.S. 638. *See* 8 Lawrence P. King, et al., *Collier on*

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[10]Each of the three cases cited by Petitioners was decided under the old Federal Rules of Bankruptcy Procedure not applicable to this case. Petitioners at least had a duty to point out to the Court that the Federal Rules of Bankruptcy Procedure applicable therein were not the same as those currently enacted. Petitioners also had a duty to compare the Federal Rules of Bankruptcy Procedure cited by the respective courts with the Federal Rules of Bankruptcy Procedure currently enacted.

[11]In the Reply Brief of Appellant/Defendant Donald Edward Hamer filed with the District Court on February 28, 1995 at 9 n.2, and the Brief of Appellee/Defendant Donald Edward Hamer filed with the Third Circuit on November 19, 1996 at p. 30, n.16, counsel for Respondent pointed out to Petitioners that these cases were no longer good law in light of the fact that Congress amended the Federal Rules of Bankruptcy Procedure, removing the courts' discretion to apply excusable neglect in the context of dischargeability complaints. Despite being apprised by Respondent's counsel, and the admonishment of the District Court that the excusable neglect standard in this case, and *Cipa*, *Ragsdale*, and *Bartley* had been legislatively overruled, Petitioners have again cited them as authority.

Bankruptcy ¶4007.05, p. 4007-9 (15th ed. 1995). *Taylor* involved the time limit to file an objection to an exemption of property taken under §522(*l*). There the Trustee failed to file an objection to a stated exemption within the time prescribed by Rule 4003(b). This Court affirmed the holding of the Third Circuit which specifically held that the deadlines enunciated in Rule 9006(b)(3) are to be applied strictly without any leeway. See *Taylor v. Freeland & Kronz*, 938 F.2d 420 (3d Cir. 1991)[12]. Rule 4003(b), like Rule 4007(c), is one of the rules enumerated in Rule 9006(b)(3).

In analyzing whether the court could extend such time, the Third Circuit looked at Rule 9006(b)(3) and stated:

> Bankruptcy Rule 9006(b)(3) allows enlargement of the time period for taking action under certain bankruptcy rules, but specifically states that the court "may enlarge the time for taking action under [Rule] . . . 4003(b) . . . only to the extent and under the conditions stated in those rules."

Id. at 423. Since Rule 4003(b) and 4007(c) are both rules enumerated in Rule 9006(b)(3), without distinction, there is no reason why there should be a different application of Rule 9006(b)(3) in the context of Rule 4007(c).

IV

THE DECISION BELOW IS NOT IN CONFLICT WITH A RELEVANT DECISION OF THE SUPREME COURT

Petitioners assert that the holdings of the District Court and Third Circuit below conflict with the holding espoused by this Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380 (1993), which empowers a bankruptcy court to apply excusable neglect in appropriate circumstances. Petitioners posit that the liberal "excusable neglect" standard set forth in *Pioneer* should be applied to Rule 4007(c).

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[12]In the context of Rule 4003(b), this Court has noted, "[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor*, 503 U.S. at 644; *see also Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Of course there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process."); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988).

Presumably the District Court and the Third Circuit did not address *Pioneer* because of its inapplicability. Respondent submits that the holding below is wholly in concert with the guidelines this Court has set forth in *Pioneer* regarding when "excusable neglect" should be applied. Footnote 4 in *Pioneer* provides in pertinent part:

> The time-computation and -extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006 enumerate those time requirements excluded from the operation of the "excusable neglect" standard.

Pioneer, 507 U.S. at 389, n.4. As noted throughout, Rule 4007(c) is one of the time requirements listed as excepted in 9006(b)(3). Accordingly, a reading of *Pioneer* clearly indicates that it has no application under Rule 4007(c) as the Petitioner asserts. *Pioneer* "is not properly read as setting an across the board standard of 'excusable neglect'." *In re Mowers* 160 B.R. 720, 723 (Bankr. N.D.N.Y. 1993). As this Court noted in *Pioneer*, excusable neglect should only be used to excuse late filings "where appropriate." *Pioneer*, 507 U.S. at 388. *Pioneer* simply elucidated the meaning of "excusable neglect" under 9006(b)(1). *Mowers*, 160 B.R. at 724; *see also Gray*, 156 B.R. at 710 (Bankr. D. Me. 1993) (citing *Pioneer*, 113 S. Ct. at 1497 (507 U.S. at 393-94)) ("Although some rules permit relief from orders or from other consequences of default upon a showing of excusable neglect, such relief is sometimes expressly unavailable.").

> Given the whole discussion in *Pioneer* focusses on Fed. R. Bankr. P. 9006(b)(1), *Pioneer* may appropriately be applied in all instances where Fed R. Bankr. P. 9006(b)(1) governs the enlargement of time frames prescribed by the other bankruptcy rules. *However, pursuant to subsection (b)(3) of 9006, and as noted by the Supreme Court at __ U.S. __ n.4, 113 S. Ct. at 1495 n.4, the times provided under Fed. R. Bankr. P. [4007(c)] are specifically excepted from the reach of Fed. R. Bankr. P. 9006(b)(1).*

Mowers, 160 B.R. at 724 (emphasis added).

Since *Pioneer* is clearly inapplicable, Respondent will not respond to the five factor "*Dix*" test as adopted by *Pioneer* and discussed in detail in the Petition.

V

THE THIRD CIRCUITS HOLDING IS NOT IN CONFLICT WITH THE HOLDING OF ANY OTHER CIRCUIT

As the District Court noted, "every decision dealing with the issue at bar has held that excusable neglect cannot be used in the context of Rule 4007(c)." Op. at 6a and cases cited therein at 6a-8a. Petitioners assert that the holding of United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") in *Manufacturers Hanover v. Dewalt (In re Dewalt)*, 961 F.2d 848 (9th Cir. 1992) is in conflict with the holdings of other United States Circuit Courts of Appeal. This simply is not true. The Ninth Circuit holding in *Dewalt* merely set a thirty day actual notice limit as the benchmark for determining the appropriateness of equitable relief. *See Dewalt*, 961 F.2d at 851. In that case the bankruptcy court had dismissed a complaint objecting to dischargeability which was filed over four months after the complaint bar date because the creditor knew of the bar date only seven days prior thereto, but did not seek an enlargement of time. The Bankruptcy Appellate Panel affirmed, but the Ninth Circuit reversed, holding that the creditor had to have more than seven days notice of the bar date. While the Ninth Circuit declined to set a bright-line rule, the court felt that a creditor should generally have a 30-day window of opportunity, as contemplated by Rule 4007(c). The critical "factor" that separated *Dewalt* from the case at bar and other Ninth Circuit rulings, was that the creditor only had seven days notice prior to the bar date. The Ninth Circuit stated that seven days was simply not enough time to put a creditor on notice.

In fact, when confronted with facts similar to the case at bar, the Ninth Circuit has, after *Dewalt*, held that notice is sufficient when the creditor has actual notice of the bankruptcy filing in time to file a complaint under 11 U.S.C. §523(a). *Kelly v. Gordon (In re Gordon)*, 988 F.2d 1000 (9th Cir. 1993) (holding that 57 days notice before deadline to file a complaint under 11 U.S.C. §523(a) was sufficient notice when creditor had actual notice of filing); *De La Cruz*, 175 B.R. at 23 ("Since creditor had more

than 30 days notice of the bankruptcy case, she had sufficient notice."). In *Gordon*, the creditors sought equitable relief from the limitations period on the ground that the debtor's attorney notified only one of three state court plaintiffs/creditors of the bankruptcy filing. However, the two other creditors received actual notice of the bankruptcy case 57 days prior to the bar date. Thereafter, those creditors filed a complaint objecting to dischargeability two days after the deadline to do so. The bankruptcy court dismissed the complaint as untimely. In affirming the denial of equitable relief, the Ninth Circuit followed the dictate of *Lompa v. Price (In re Price)*, 871 F.2d 97, 99 (9th Cir. 1989), holding that "[c]ounsel for the appellant[s] in the present appeal was given actual notice of the bankruptcy proceedings in time to file a complaint, or at least to file a timely motion for an extension of time." *Gordon*, 988 F.2d at 1001. Presumably, Petitioners were cognizant of the holding in *Gordon* as they have cited to it. Petition at 7. Accordingly, the Ninth Circuit is not in conflict with the holding of the Third Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: July 31, 1996

Respectfully submitted,

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By: _____
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APPENDIX A-OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 13, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE DONALD E. HAMER
BERDJ MOVSESIAN, ADRIENNE MOVSESIAN, NOUBAR MAHDESSIAN, ANN MAHDESSIAN, A & N, INC. and BERDJ & NOUBAR CORP., **Plaintiffs/Appellees,** **vs.** **DONALD E. HAMER,** **Defendant/Appellant.**

Civ. No. 95-81
OPINION

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Debevoise, Senior District Judge.

This an appeal of a decision of the bankruptcy court. The question on appeal is whether the bankruptcy court erred in not dismissing plaintiffs' Complaint to Determine Dischargeability for late filing. For the reasons set forth below, the decision of the bankruptcy court is reversed.

Appendix A

BACKGROUND

On March 5, 1990, Berdj Movesian, Adrienne Movsesian, Moubar Mahdessian, Ann Mahdessian, Berdj & Noubar Corporation, and A & N Inc. ("plaintiffs"), instituted a lawsuit in the Superior Court of New Jersey, Law Division, Camden County, against Donald E. Hamer, and Route 541-23, Inc. ("Rt. 541") and Mt. Holly Car Wash, Inc. ("Mt. Holly"), companies which were wholly owned by Hamer. The plaintiffs alleged, inter alia, fraud, misrepresentation, and violation Of the New Jersey Consumer Fraud Act by Hamer in connection with Hamer's sale to the plaintiffs of a car wash business and the underlying real property.

On October 25, 1993, Hamer, Rt. 541, and Mt. Holly filed Chapter 11 bankruptcy petitions with the Bankruptcy Court. The state court action of plaintiffs was removed to the United States District Court for the District of New Jersey, and pursuant to the local rules, were referred to the bankruptcy court. The first creditors' meeting was scheduled for December 27, 1993. Although counsel for the plaintiffs did not receive the court's notification of the meeting because the notice sent did not include name of counsel in the address, counsel for plaintiffs attended the creditor's meeting. Under Bankruptcy Rule 4007(c), 60 days after the first creditors meeting, all creditors were required to file a Complaint to Determine Dischargeability of debt. Therefore, a deadline was set for February 25, 1994.

Plaintiffs filed a Complaint to Determine Dischargeability with the bankruptcy court on February 28, 1994. The Complaint was filed one day later than the filing deadline, taking into consideration the weekend.

On March 29, 1994, Hamer filed a motion to dismiss the adversary proceeding because the Complaint was filed after the deadline to do so. In response to the dismissal motion, the plaintiffs filed a Certification of Jennifer P. Iommie dated April 11, 1994 in which she stated that the reason the Complaint was sent to the Bankruptcy Court late was because she "looked in a book where [she] had the

Court's address and [she] addressed the package to said address." She was "not aware that, since so listing the address, the Court had moved across the street . . . ."

On September 8, 1994, the Bankruptcy Court heard oral argument with respect to the dismissal motion and thereafter entered its opinion on the record denying the dismissal motion. The bankruptcy court ruled that plaintiffs' late filing of the complaint was excusable neglect. An order was entered on September 28, 1994.

Hamer filed a motion for reconsideration on September 26, 1994. At the hearing on the Reconsideration Motion on November 1, 1994, the Bankruptcy Court heard oral argument and thereafter entered its opinion on the record denying the Reconsideration Motion. The Order Denying Motion for Reconsideration was subsequently entered on November 14, 1994.

The bankruptcy court gave three reasons for its denial of defendant's motion to dismiss. The first was the fact that the notification sent to plaintiffs' counsel did not include counsel's name on the address. The second was that, although plaintiffs sent their Complaint to the bankruptcy court on time, they used the old address of the bankruptcy court on the envelope and so the Complaint did not reach the bankruptcy court until the next day. The third is that the defendant removed the matter with the plaintiffs from state court to the bankruptcy proceeding, and therefore the defendant had notice of the plaintiffs" claim. See Transcript Proceedings of before Bankruptcy Judge Tuohey at 67-69 (Nov. 1, 1994).

STANDARD ON APPEAL

The proper standard of review to be applied by a district court when reviewing a ruling of a bankruptcy court is determined by the nature of the issues presented on appeal. The factual determinations of the bankruptcy court are to be given conclusive effect unless they are "clearly erroneous." See Landon v. Hunt, 977 F.2d 829, 830 (3d Cir. 1992); J.P. Fyfe, Inc. v. Bradco Supply Co., 891 F.2d 66, 69 (3d Cir. 1989); In re Morrissey, 717 F.2d 100, 104 (3d Cir. 1983); Mellon Bank

Appendix A

v. Makoroff, 153 B.R. 155, 157 (W.D. Pa. 1993); In re Continental Airlines, 150 B.R. 334, 336 (D. Del. 1993). Legal conclusions of the bankruptcy court, on the other hand, are to be accorded no deference and are subject to de novo or plenary review by the district court. See Landon, 977 F.2d at 830; J.P. Fyfe, 891 F.2d at 69; Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 84 (3d Cir. 1988); Mellon Bank 153 B.R. at 157; Continental Airlines, 150 B.R. at 336.

Although the bankruptcy court made factual findings, the dispositive issue involves a legal determination, namely, whether a bankruptcy judge can extend the time for filing a complaint to determine dischargeability under Bankruptcy Rule 4007(c) for excusable neglect absent a motion to extend the time made before its expiration. Thus the bankruptcy court's decision is subject to de novo review.

DISCUSSION

On appeal to this court is the following issue: Whether a bankruptcy court can allow a plaintiff to file a Complaint to Determine Dischargeability ("Complaint") late if the late filing was the result of excusable neglect. I hold that a bankruptcy court cannot allow a plaintiff to file a late Complaint, even if excusable neglect is found to exist, unless the plaintiff follows the Procedure set out in Bankruptcy Rule 4007(c). Because the plaintiffs in this case filed late, and failed to follow Bankruptcy Rule 4007(c), the bankruptcy judge erred when he did not grant the defendant's motion dismiss their Complaint. The bankruptcy judge's decision to relieve plaintiffs of the filing deadline by use of excusable neglect violated the Bankruptcy Rules.

Under Bankruptcy Rule 4007(c), the filing deadline for a Complaint is 60 days after the first creditors' meeting. In this case, the creditors' meeting was on December 27, 1993. Therefore the deadline for filing the Complaint was set at February 25, 1994. Although plaintiffs failed to meet this deadline, the bankruptcy court denied defendants motion to dismiss the Complaint, ruling that plaintiffs, failure to meet the deadline was excusable neglect. This decision, however, is contrary to a plain reading

of the Bankruptcy Rules.

Bankruptcy Rule 4007(c) states as follows.

> A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of the creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Bankruptcy Rule 4007(c). Rule 4007(c) is clear: a party may file a late Complaint with the court, but only if the party first moves to extend the time period for filing.

Bankruptcy Rule 9006(b) governs enlargement of time periods under the Bankruptcy Rules. Subsection (1) covers filing extensions generally:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Bankruptcy Rule 9006(b)(1). Therefore, a bankruptcy court is generally accorded the power to enlarge time periods if excusable neglect is demonstrated. However, this provision is limited subsections (2) and (3).

Subsection (3) applies to Rule 4007(c). This subsection states as follows:

> The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those rules.

Bankruptcy Rule 9006(b)(3). The power granted by Rule 9006(b)(1) to enlarge applicable time periods if excusable neglect is demonstrated by a party is, by this subsection, explicitly withheld from courts in the context of Rule 4007(c). Subsection (3) only allows a court to enlarge the time period in which to file a Complaint as that rule permits: when a party makes a motion <u>before</u> the 60 day time period expires.

The plaintiffs failed to make a motion to extend their time to file a Complaint before the 60 day

period expired, and, under Rule 9006(b), the bankruptcy court is not permitted to take into account excusable neglect to relieve plaintiffs of the deadline. Therefore, the bankruptcy court was in error when it decided that the plaintiffs' failure to file by the February 25, 1994 deadline was excusable neglect.

The holding that a court is only able to relieve a creditor of the filing deadline if a party makes a motion before the deadline is further bolstered by the fact that under the former Bankruptcy Rules a court was allowed to relieve a party from a Complaint filing deadline if the court found excusable neglect. See former Bankruptcy Rules 409(a)(2) & 906(b). As one judge has stated: "It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim." In re Figueroa, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983).

Although the Third Circuit has not ruled on whether a bankruptcy court can excuse the late filing of a Complaint when a deadline is set pursuant to Rule 4007(c),[1] a number of courts have ruled on this issue. The plaintiffs have failed to cite any case in which a court has ruled under the current Bankruptcy Rules that a court may consider excusable neglect when a creditor failed to file a Complaint within the time allowed under Rule 4007(c).[2] On the other hand, every decision dealing with the issue at bar has

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[1] In In re Poskanzer, 146 B.R. 125 (D.N.J. 1992), Judge Wolin noted, however, that the Third Circuit "has generally interpreted other Code filing dates strictly. Id. at 129-30 (citing In re Verientes, Ltd., 845 F.2d 57 (3d Cir. 1988); Taylor v. Freeland & Kronz, 938 F.2d 420 (3d Cir. 1991); Chrysler Motors Corp. v. Schneiderman, 940 F.2d 911 (3d Cir. 1991)).

[2] Plaintiffs do cite to a number of cases which allow late filings of objections to exemptions upon the demonstration of inequities. See Plaintiffs' Brief at 14 (citing Matter of Cipa, 11 B.R. 968, 970 (Bankr. W.D. Pa. 1981); Ragsdayle v. Genesco, Inc., 674 F.2d 277, 278 (4th Cir. 1982); In re Bartley, 33 B.R. 768, 770 (Bankr. E.D.N.Y. 1983)). The plaintiffs' argument by analogy to the filing of a complaint is not necessarily a bad one. However, the plaintiffs' citation to law prior to the adoption of the current Bankruptcy Rules is problematic because Congress has done away with the excusable neglect standard in the context of the filing of objections as well. See Bankruptcy Rule 4003.

held that excusable neglect cannot be used in the context of Rule 4007(c). See Kelly v. Gordon (In re Gordon), 988 F.2d 1000, 1001 (9th Cir. 1993) (plaintiffs could not be relieved of 4007(c) deadline by snowing excusable neglect); Byrd v. Alton (In re Alton), 837 F.2d 457, 459 (11th Cir. 1988) ("The dictates of the Code and Rules are clear. It is not our place to change them. Under Rule 4007(c), any motion to extend the time period for filing a dischargeability complaint must be made before the running of that period."); Jones v. Hill (In re Hill), 811 F.2d 484, 486 (9th Cir. 1987), In re Poskanzer 146 B.R. 125, 127 (D.N.J. 1992) ("A bankruptcy court possesses limited discretion, however, to permit filing beyond the bar date."); In re Biederman, 165 B.R. 783, 788 (Bankr. D.N.J. 1994) ("a court has limited discretion to extend the deadlines for filing complaints objecting to the debtors discharge, or the dischargeability of a creditor's claim and has no jurisdiction for doing so if the request for an extension is made after the deadline has expired"); In re Jeffrey, 169 B.R. 25, 27 (Bankr. D. Md. 1994) ("the Court is powerless to extend the deadline"); In re Klein, 64 B.R. 372, 376 (Bankr. E.D.N.Y.) ("under the new bankruptcy rules, a court cannot allow extension of deadline for excusable neglect"). In addition, courts have also held that excusable neglect cannot be used under Rule 4004(a). See e.g., In re McDowell, 57 B.R. 310 (Bankr. M.D. Penn.) ("this court lacks authority to grant untimely requests for extensions even where the requests are late due to alleged excusable neglect"); In re Smithuysen, 54 B.R. 661 (Bankr. D. Md. 1985) ("[t]his Court is quite restricted in its discretion to enlarge the time period to permit [plaintiff] to file his complaint").

The only situation in which courts have held that a party can file a late Complaint is where the court itself failed to give the party notice of the creditors' meeting or gave incorrect information about the filing deadline. See, e.g., In re Poskanzer, 146 B.R. at 127-28; In re Hershkovitz, 101 B.R. 816, 819 (Bankr. N.D. Ga. 1989) ("this Court finds that it would be a great injustice if Plaintiffs were precluded from maintaining their dischargeability complaint against Defendant-Debtor simply because they

relied on an order of the court which was erroneously entered").

In Poskanzer, Judge Wolin explained as follows:

> A bankruptcy court possesses limited discretion, however, to permit filing beyond the bar date. Bankr.R. 9006(b)(3). A creditor's receipt of inadequate notice represents one instance where courts have traditionally extended the time to file the complaint. But this discretion is limited. More specifically, section 523(a)(3)(B) of the Code tempers the discretion permitted under the Bankruptcy Rules by limiting late filing only to those creditors who lack notice or actual knowledge of the case to permit timely filing. A plain-reading of the Code and the Bankruptcy Rules suggests that a creditor's possession of actual knowledge of the case vitiates an inadequately noticed creditor's ability to file out of time.

Id. (footnotes omitted).

In other words, absent moving for an extension of time as provided in Rule 4007(c), a creditor can only file a Complaint past the deadline if the plaintiff failed to receive a notice from the court or actual notice of the proper deadline. Allowing a creditor without notice to file past the deadline is not a back door way of permitting excusable neglect, however. A creditor without notice of the deadline has not even had the opportunity to commit neglect, and it would be unfair (and a violation of due process) to bar that creditor from bringing a claim without notification of the deadline to file a Complaint.

In the case at bar, plaintiffs assert that they never received the notification of the deadline from the court because their lawyer's name was not included as part of the address. However, as the bankruptcy judge noted, the plaintiffs obviously had actual notice of the deadline for the filing of their Complaint against defendant because their attorney attended December 27, 1993 creditors' meeting. In light of the fact that plaintiffs had actual notice of the February 25, 1994 filing deadline, plaintiffs cannot file late.

Although barring the plaintiffs from filing a complaint in this case may seem inequitable, Congress has not provided for any other result. In a case construing the Federal Rules of Civil Procedure in which a similar result was reached, the Supreme Court declared: "Of course there is an element of

arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process." Schiavone v. Fortune, 477 U.S. 21, 31 (1986). See also, Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988). In addition, the Third Circuit has acknowledged that the purpose of the Code and the Bankruptcy Rules in refusing to permit a late filing: "[T]he time limits of the statute and bankruptcy rule 'serve the dual purposes of finality and certainty. in the bankruptcy context, the need for finality and certainty is especially acute.' While we recognize that our result could grant a debtor an 'undeserved windfall' we point [ ] out that '[t]hat is true of enforcement of all procedural rules.'" Chrysler Motors Corp. v. Schneiderman, 940 F.2d 911, 914 (3d Cir. 1991).

CONCLUSION

The bankruptcy court erred in not dismissing plaintiffs' complaint to determine Dischargeability for failure to file it within the time required under the Bankruptcy Rules. The matter will be remanded to the bankruptcy court for dismissal in accordance with this opinion. An appropriate order follows.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.D.J.

Date: April 10, 1995

Appendix B

APPENDIX B-EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY ON NOVEMBER 1, 1994, PP.46-49, 58-60.[1]

***[46]** State Court and other items. The only issue before me today is the narrow question of the debtor asking this Court to reconsider its ruling that adversary Complaint 94-2126 is time barred in that it seeks to object -- to discharge, and that since it was filed out of time, this Court should reconsider its ruling of September 8th and in effect, at this point, time bar the suit.

Now, really the record that I rule on is the record that was before me on September 8th. The only thing I am noting, all of the exhibits that we've marked today as Exhibits D-1 through D-4 to make the argument a little more coherent, were clearly before the Court. They're exhibits taken from the original bankruptcy file of Mr. Hamer in his Chapter 11. We have marked them from the clerk's file today as D-1, D-2, D-3 and D-4. Each of those exhibits was referred to in the transcript on September 8th and so I've not opened up the record today and taken new evidence, and I'm considering this strictly as a Motion for Reconsideration based on the prior record and all we've done is mark the exhibits for clarification purposes. Probably should have done that on September 8th and I didn't.

I note initially that the transcript and my -- one factual point in my transcript is incorrect and I so note incorrect that page 55 of the September 8th transcript commencing at line 11 when I make a ruling that the Bankruptcy ***[47]** Court moved from what is referred to as the Rodino building to what is referred to as the Martin Luther King Courthouse occurred in December of '93. I was off by one year. It points to my slip into senility. The move did occur in December of '92 and today, all -- both sides in the Court agree that I mis-spoke when I made that reference in the page 55 of the transcript.

I do note, however, I just -- out of curiosity, I pulled the 1993 Diary. The 1993 Lawyer's Diary,

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[1]The page numbers of the excerpt shall be preceded by a "*" and followed by the page number of the transcript of the hearing before the Honorable William F. Tuohey, U.S.B.J. on the Reconsideration Motion as transcribed by L.B.S. Inc., which is the same transcript as provided in the Petition.

on page 44 and 45 refers to Bankruptcy Court and addresses and refers to our address throughout the 1993 Lawyer's Diary as being the Rodino Building, so-called 970 Broad Street, Newark. So anyone throughout 1993 that looked in the Lawyer's Diary even though we had moved in December of '92 would have beet advised that we were still in the Rodino building. I note that simply because those Lawyers Diaries are published months before the end of the year. That '93 Diary undoubtedly came in in November before -- a few days before we moved. I'm not making a finding on that. There's no, really, record to support it but I just simply note -- I think I can take judicial notice of the fact that the Lawyers Diary for 1993 which all of us I'm sure have before us, did still use the old address for whatever reason.

All right. Now, I'm convinced that I was correct in my finding despite the strenuous argument of debtor's counsel today that the notice to creditors there is no proof in the *[48] record that the notice to creditors received by any of the individual plaintiffs who seek to have their debt nondischarged. In fact, the notice to creditors which we marked today As D-3 has an Affidavit from the clerk of the Court that he did not, that the clerk was not able to mail it to the individuals. The reason for that is reflected in D-4, the schedules and matrix which the clerk works from and while there are a series of names on the very first page of Exhibit D-4 in evidence such as Movsesian, there are group of plaintiffs herein called Movsesian and another group called Mahdessian, M A H D E S S I A N. There's no address presented in the box next to those names.

Now, debtor argues strenuously that if you continue reading the first page of D-4, you come to an entry that says after those names that I have read, c/o Markwardt and Katkocin with a Sturbridge Office Park and a Suite 1203 address in Voorhees, New Jersey. Now, it is true that that's the way the schedules as prepared by debtor's counsel read, but it is equally true that the notice to creditors reflects that the clerk of the Court, based on the way the matrix was prepared by debtor's counsel, did not or felt they were not able to mail it to the individuals. And the notice to creditors, Affidavit of service attached

thereto as Exhibit D-3 in evidence reflects that. Now, it does show on the first page of the proof of service as part of D-3 that a mailing did go to something known *[49] as Sturbridge Office Park, Suite 1203. But again, no law firm, no attorney in that law firm is noted.

Mr. Cooper (sic) for the debtor argues strenuously well, at the very least, the notice would have been dropped on someone's -- when the mail came in on a certain date, it would have been there as -- I guess like occupant mail he would argue. But I don't find that that is effective service. After all, the clerk acts based on the schedules prepared by the debtor, and the schedules prepared by the debtor, D-4, were not pristine and clear on this point.

It's also argued in this reconsideration motion by Mr. Markwardt for the complainants whose claim is sought to be barred that there's no mystery as to the addresses of his clients. These are the people that bought a car wash operation from Mr. Hamer years before the bankruptcy and that business transaction in the late 1980's when the debtor sells a car wash to Mr. Markwardt's clients results in a long series of lawsuits, several lawsuits, venue motions, all reflected in the argument before on September 8th and the pleadings filed in support of the various motions at that time. And all of that litigation had stretched on for a year or two in the State Court, was pending, and it was on the eve of actions in that State Court lawsuit that Mr. Hamer was driven to file this bankruptcy to seek protection. So when he files his schedules with the clerk of the Bankruptcy Court, D-4, on November 3rd,

*[58] individuals, and that that confusion was brought out by the debtor in the way the paperwork was filed that the Clerk of the Court relies on. That's point one.

But if that was the only issue, I had found in Poskanzer that actual notice is enough. As Judge Wollin, in reciting the facts in Poskanzer and affirming my bar date decision in that, that's 146 B.R. 125, Judge Wollin notes that there was actual notice in Poskanzer and they attended the creditor's meeting.

Well, we have that in this case, so if there was only that issue, it's conceded that the Movsesian counsel was at the creditor's meeting, they might fail.

But then we move on to the allegation about the Court had moved a year or 14 months before the bar date, the secretary makes a mistake, wherever she gets the address from is really immaterial and although I note as a footnote, the Lawyer's Diary throughout the whole year of 1993 after we've already moved tells everybody that we're still in the old building.

For whatever reason, the secretary makes a mistake, types the wrong address, gives to a verified or a normal commercial delivery company, they come here on a Friday, for whatever reason didn't deliver the papers, the Court's not in the building. The next day, they correct the situation, they come over to the correct building at 9:30 in the morning and file the papers. ***[59]**

Again, if that was the only issue if that was the only thing the plaintiff stood on, I think I would have ruled the other way.

The third point, the removal of the matters by the debtor himself, in other words, the -- it's a Complaint pending, it's not a collection suit in the State Court pre-bankruptcy. It's not a breach of contract suit, it's a fraud suit.

These plaintiffs are suing this debtor for years in the State Court claiming fraud. Before the bar dates expires, this debtor drags those suits for what-ever tactical reason into the District Court, within the parameters of the bar date. The sum total of those three equitable arguments convinced me that it would be a grave miscarriage of justice to allow Mr. Hammer who starts out with an improper matrix, in my opinion. Counsel argues that the matrix meets the standard.

But when you look in Exhibit D-4 at the matrix, which is toward the rear of the exhibit, the -- the address it's almost inconceivable that anyone -- forget computers -- the address that he would have had us read here; according to the matrix is Berdj Movsesian, Andrienne Movsesian, Noubar Mahdessian,

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Ann Mahdessian, Berdj & Noubar Corporation, A & N, Inc., care of Markwardt and Katkocin, Sturbridge Office Park, Suite 1203, 180 Route 73, North Voorhees, New Jersey 08043-9505. That's a 11 line address in addressing all those *[60] parties.

I find that it is not surprising, having created that type of a matrix, that there was a foul-up in the mailing by the Clerk of the Court, particularly in view of the fact that at that point it was conceded in argument today no appearance had been filed in the bankruptcy for the individuals as argued by Mr. Markwardt that the address of his clients, the individual addresses were well-known. All of that taints the argument about the mailing that the debtor makes and supports the argument that the plaintiffs make that the mis-mailing is one of the things that created the problem here in that they never received the actual notice and the actual bar date. Admittedly, they knew about the bankruptcy, they had gotten a phone call. Admittedly, they showed up at the 341. But the record is barren of any proof of service of the bar date on the plaintiffs.

Second, we get the mistake in mailing that I -- I reviewed. And I've reviewed that and I think based on Pioneer it does rise to the level of excusable neglect. Now when I make that determination I note that the majority opinion in Pioneer requests or requires that certain findings have to be made by the trier of fact if excusable neglect is to be found. And the Supreme Court in Pioneer talks about the so-called Dix, D I X, test that's arising out of In re Dix 95 B.R. 134 Ninth Circuit Opinion from 1988, the Bankruptcy Appellate panel, a